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# Legal Pluralism? Indigenous Rights as Legal Constructs

## 1. Introduction

Both in domestic and in international law, the last twenty-five years have witnessed a general trend towards the recognition and increased protection of the rights ascribed to indigenous peoples, especially when such peoples form minority populations within the bounds of sovereign states. This is a legal process of high importance, which has gathered global momentum, and which is changing the established legal and political structure of many societies. Moreover, the same period has witnessed the consolidation of a broadly dominant theoretical model for explaining, justifying and asserting indigenous rights. That is, this period has witnessed the emergence of a particular model of *legal pluralism* to account for indigenous rights. Research on legal pluralism of itself forms a diffuse and widening sub-discipline of legal inquiry, and it has branched into a range of separate lines, each stressing the importance of informal law outside the domain of state law.<sup>1</sup> However, a distinctive variant on the theory of legal pluralism has acquired pervasive influence in conceptual reflections on indigenous rights. This is especially evident in Latin America. In some Latin American countries, this model has become a part of relevant constitutional law and jurisprudence.<sup>2</sup>

In general, this model of legal pluralism is designed to support claims to indigenous rights by proposing a distinctively sociological account of the origins and the validity of such rights. In fact, this model contains two separate sociological dimensions.

First, the model of legal pluralism applied to indigenous communities is founded, generally, in the standard socio-anthropological claim that societies containing multiple ethnic communities contain multiple legal systems, some of which are linked to communities with claims to indigeneity: that such societies contain a 'polycentric

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<sup>1</sup> See classical examples in Marc Galanter, 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law' (1981) 48 J. Legal Plur. Unoff. Law 1; Robert C. Ellickson, 'Of Coase and Cattle: Dispute Resolution among Neighbors in Shasta County' (1986) 38:3 Stanf. Law Rev 623.

<sup>2</sup> Constitutional Court of Colombia, Decision C-030/08, holding that Colombian law represents a 'multicultural and pluralist model'; Plurinational Constitutional Court of Bolivia, Decision 1422/2012, declaring that the state is based on 'pluralism, interculturality, and decolonization'. For comments see Kirsten Anker, *Declarations of Independence: A Legal Pluralist Approach to Indigenous Rights* (Farnham: Ashgate 2014) 87.

universe' of legal norms.<sup>3</sup> On this account, the existence of diverse legal systems implies that different groups identify legal rights in different ways, and indigenous legal orders give rise to constructions of rights that may be at variance with the broader legal regime of society. This aspect of the pluralism model reproduces elements of long-established theories of post-colonial legality. It reflects the conviction that rights constructed in legal systems linked to indigeneity possess distinctive historical foundations, which have usually been suppressed by formal processes of legal centralization.<sup>4</sup> Traditionally, the most forceful theorists of legal pluralism denounced the 'myth' and 'ideology of legal centralism', which they perceived as imposing a reductive normative system on the pluralistic social fields contained in post-colonial societies.<sup>5</sup> In recent theories, this pluralist approach has been supplemented by a theory of 'interlegality', which accentuates the important role of *legal hybridization*, caused by the interaction between global law and indigenous law, in forming indigenous rights.<sup>6</sup> In each perspective, indigenous law produces rights whose legitimacy results from the fact that they reflect historically embedded, although chronically marginalized, customs and life structures, and the assertion of such rights challenges the dominance of formalistic systems of national law.<sup>7</sup> Owing to their originality and deep co-ordination with customary behavioural patterns, such rights are widely seen as possessing greater authenticity than mere law in books.<sup>8</sup> One sociologist perceives indigenous rights as giving

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<sup>3</sup> Elisa Cruz Rueda, 'Principios generales del derecho indígena' in Rudolf Huber et al, eds, *Hacia sistemas jurídicos plurales. Reflexiones y experiencias de coordinación entre el derecho estatal y el derecho indígena* (Bogota: Konrad Adenauer Stiftung, 2008) 29-50; 29.

<sup>4</sup> This perspective is reflected in sociological and jurisprudential literature. See Sally Engle Merry, 'Legal Pluralism' (1988) 22:5 Law Soc. Rev 869 at 873 [Merry, 'Legal Pluralism']; Brian Z. Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 Syd. Law Rev 375 at 390-399; Franz von Benda-Beckmann, *Rechtspluralismus in Malawi: Geschichtliche Entwicklung und heutige Problematik* (Munich: Weltforum Verlag, 1970) 64; M. B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Law* (Oxford: Oxford University Press, 1975) 2; Franz von Benda-Beckmann, 'Who's Afraid of Legal Pluralism?' (2002) 37 J. Legal Plur. Unoff. Law at 60. It is also at the core of some anthropological literature. See Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Fontana, 1983) 184.

<sup>5</sup> See John Griffiths, 'What is Legal Pluralism?' (1986) 24 J. Legal Plur. Unoff. Law at 1.

<sup>6</sup> See Boaventura de Sousa Santos, *Toward a New Legal Common Sense*, 2<sup>nd</sup> ed (Cambridge: Cambridge University Press, 2002) 437 [de Sousa Santos, *New Legal Common Sense*]; Boaventura de Sousa Santos, 'The Heterogeneous State and Legal Pluralism in Mozambique' (2006) 40(1) Law Soc. Rev 39 at 70; María Teresa Sierra, 'Derecho indígena y acceso a la justicia en México: Perspectivas desde la interlegalidad' (2005) 41 Revista IIDH 287 at 310. See also Robert Albrow, 'Confounding Cultural Citizenship and Constitutional Reform in Bolivia' (2010) 37:3 Latin American Perspectives 71 at 80. Our account differs from these theories in that it challenges the presumption that pluralism is based in existing legal norms and entitlements.

<sup>7</sup> See Raúl Prada Alcóriza, 'Estado plurinacional comunitario autonómico y pluralismo jurídico' in Boaventura de Sousa Santos & José Luis Exení Rodríguez, eds, *Justicia indígena, plurinacionalidad e interculturalidad en Bolivia* (Quito: Abya-Yala, 2012), 410.

<sup>8</sup> See Boaventura de Sousa Santos, *The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada Law* (1977) 12 Law Soc. Rev. See the original version of this argument in Eugen Ehrlich, *Grundlegung der Soziologie des Rechts*, 4<sup>th</sup> edition (Berlin: Duncker und Humblot, 1989[1913]).

expression to a distinct and comprehensive indigenous value system, and as founding a 'distinct legal code, different from positive law and ordinary justice'.<sup>9</sup> Even theories of indigenous rights that reject romantic approaches to legal pluralism understand indigenous rights as rights that are prior to the legal order of the nation state, possessing 'a kind of historical precedence' to the state – that is, as rights that indigenous peoples 'had always enjoyed before they were taken away from them'.<sup>10</sup>

Second, the model of legal pluralism that is used to explain indigenous rights derives some ideas from conflict-sociological accounts of *legal mobilization*.<sup>11</sup> In this respect, the theory of legal pluralism concerned with indigenous law deviates from other lines of pluralistic theory, which have often expressed a lack of confidence in the law as a means of overarching social transformation.<sup>12</sup> The pluralism model referring to indigenous rights typically indicates that litigation for collective rights consolidates new participatory patterns of citizenship and subject formation.<sup>13</sup> Indeed, in this perspective, indigenous rights are seen as expressions of pluralistic modes of popular sovereignty or sub-national citizenship, and which reflect the demands for autonomy of different social groups in relation to more formally structured national legal orders.<sup>14</sup> In this respect, the model of legal pluralism borrows elements from theories of social process litigation,

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<sup>9</sup> Simón Yampara Huarachi (Aymara researcher and advisor of the Foundation Qullana Suma Qamaña), *Address at the Seminar on Law and Community Justice organized by the APPNOI-TARI-Community Pacha[kuti]: Cosmo-convivencia, Derecho y Justicia de los Pueblos Qullana* (2005). Available at <http://www.katari.org/pdf/justicia%20Qullana.pdf>.

<sup>10</sup> See Sousa Santos, *New Legal Common Sense*, supra note 6 at 245. For a similar claim see Esther Sánchez Botero, 'Aproximación desde la antropología jurídica a la justicia de los pueblos indígenas' in Boaventura de Sousa Santos and Mauricio García Vilegas, eds, *El caleidoscopio de las justicias en Colombia*, vol. II (Bogota: Siglo de Hombre Editores, 2001) 186.

<sup>11</sup> See the account of indigenous rights as results of a 'struggle for a collective law' in Boaventura de Sousa Santos, 'El significado político y jurídico de la jurisdicción indígena' in Boaventura de Sousa Santos and Mauricio García Vilegas (eds), *El caleidoscopio de las justicias en Colombia*, vol. II (Bogota: Siglo de Hombre Editores, 2001) 208. For classic studies in this tradition see J. P. Nettl, *Political Mobilization: A Sociological Analysis of Methods and Concepts* (New York: Basic Books, 1967) 247; Stuart Scheingold, *The Politics of Rights. Lawyers, Public Policy, and Political Change* (New Haven: Yale University Press, 1974) 131; Michael McCann, 'Law and Social Movements' in Austin Sarat, ed, *Blackwell Companion to Law and Society* (Oxford: Blackwell, 2004) 508.

<sup>12</sup> Merry, 'Legal Pluralism', supra note 4 at 879.

<sup>13</sup> See Álvaro Bello, *Etnicidad y ciudadanía en América Latina. La Acción colectiva de los pueblos indígenas* (Santiago de Chile: CEPAL, 2004) 15 [Bello, *Etnicidad y ciudadanía*].

<sup>14</sup> See Victoria Bomberry, 'Refounding the Nation: A Generation of Activism in Bolivia' (2008) 51:12 *American Behavioural Scientist* 1790; Donna Lee Van Cott, 'A Political Analysis of Legal Pluralism in Bolivia and Colombia' (2000) 32:1 *Journal of Latin American Studies* 207 at 207; Pascal Lupien, 'The Incorporation of Indigenous Concepts of Plurinationality into the New Constitutions of Ecuador and Bolivia' (2011) 18(3) *Democratization* 774 at 779; and Deborah Yashar, *Contesting Citizenship in Latin America. The Rise of Indigenous Movements and the Postliberal Challenge* (Cambridge: Cambridge University Press, 2005) 55.

claiming that legal mobilization consolidates the legal position and the sectoral citizenship of minority social groups.<sup>15</sup>

There is much common ground between the two conceptual lineages that flow together in the pluralistic construction of indigenous rights. Both lines of analysis reflect the assumption that the formal law of national society prevents sectoral collectives from gaining full legal recognition. Both observe indigenous rights as the outcomes of demands for recognition for socially existing, but typically suppressed, group identities and collective practices. In both perspectives, the assertion of indigenous rights expresses a mode of contested citizenship, and the solidification of plural legal orders and plural rights appears as a process that either weakens, or reflects a weakening of, the sovereign power of state institutions and the dominance of formal legal norms.<sup>16</sup>

This article sets out a critique of pluralistic constructions of indigenous rights. In particular, it questions the assumption that such rights are asserted by generically distinct subjects, and that they assume legitimacy because of their embeddedness in a legal order that has priority to formal national law.<sup>17</sup> Moreover, it questions the related assumption that acknowledgement of such rights fragments formal law, or articulates legal norms that challenge the institutional foundations of formal law.

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<sup>15</sup> On some accounts the assertion of indigenous rights is simply classified as a 'social process': Bello, *Etnicidad y ciudadanía*, supra note 13 at 43. Some leading versions of legal pluralism accentuate collective litigation as a new mode of subject formation. See for example Antonio Carlos Wolkmer, *Pluralismo jurídico. Fundamentos de una nova cultura de Direito*, third revised edition (Sao Paulo: Alfa Omega, 2001) 294 [Wolkmer, *Pluralismo jurídico*]. On litigation as a distinctive expression of citizenship, see Reva B. Siegel, 'Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era' (2006) 94:5 Calif. Law Rev 1323 at 1333; William N. Eskridge, 'Channeling: Identity-Based Social Movements and Public Law' (2001) 150:1 Univ. Pa. Law Rev 419 at 454-458; Stephen C. Yeazell, 'Brown, the Civil Rights Movement and the Silent Litigation Revolution' (2004) 57:6 Vand. L. Rev 1974 at 1990.

<sup>16</sup> For many variants on this claim see Wolkmer, *Pluralismo jurídico*, supra note 15 at 140; Antonio Carlos Wolkmer, 'Repensando a questão da historicidade do estado e do direito na América Latina' (2006) 1:4 Panóptica 1:4 82 at 94. For an extreme position see the claim that legal pluralism linked to indigeneity 'takes us to the limit' of the common concept of the state, which is a 'political form closed to the difference liberated by plurality' in Salvador Schavelzon, *Plurinacionalidad y Vivir Bien/ Buen Vivir. Dos conceptos leídos desde Bolivia y Ecuador post-constituyentes* (Buenos Aires: CLACSO, 2015) 167. [Schavelzon, *Plurinacionalidad*]. Even milder versions of legal pluralism relating to indigenous rights view primary rights of indigenous people as mitigating the sovereign power of the state. See for example S. James Anaya & Sergio Puig, 'Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples' (2017) 67:4 U. Toronto L.J. 535 at 453.

<sup>17</sup> As far as this article refers to wider controversies about indigeneity, it opts for an implicitly constructivist account. See for examples Rogers Brubaker, 'Ethnicity without Groups' (2002) 43:2 European Journal of Sociology 163, 186; and Gabrielle Lynch, *I Say to You. Ethnic Politics and the Kalenjin in Kenya* (Chicago: Chicago University Press, 2011) 6.

This article argues, first, that, in associating indigenous rights with given social groups, the theory of legal pluralism struggles to produce a comprehensive understanding of the subjects that claim indigenous rights, and of the grounds on which such rights can be established. This is in fact reflected in primary international instruments regarding indigenous rights, which, influenced by the theoretical concepts of legal pluralism, inform national legal norms. Tellingly, the main instrument of international law addressing indigenous peoples, Convention 169 of the International Labour Organization (ILO 169), attempts to circumvent precise definition of the subjects entitled to indigenous rights. It states in Art 1(2) that: ‘Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply’.<sup>18</sup> Similarly, the African Commission on Human Rights has observed that ‘a strict definition of indigenous peoples is neither necessary nor desirable’.<sup>19</sup> In the UN’s draft criteria for defining indigenous people, the ‘desirability of developing a definition of indigenous peoples’ is admitted, but its feasibility is questioned. This document observes that ‘the concept of ‘indigenous’ cannot be defined in precise and inclusive terms, which can be applied in the same manner to all regions of the world’. Importantly, it states that indigenous rights have been successfully delivered despite the UN ‘not having adopted any formal definition of indigenous peoples’.<sup>20</sup>

In addition, second, this article argues that, although positioned at the sociological end of the spectrum of legal analysis, the theory of legal pluralism has not adequately identified the social foundations of indigenous law. In this respect, it claims that the processes of legal mobilization that occur in the construction of indigenous rights do not articulate patterns of citizenship, in which already existent, socially localized identities are solidified *against* nationally dominant normative orders. Albeit often imperceptibly, legal mobilization for indigenous rights detaches experiences of citizenship from particular social memberships, and it both presupposes and reinforces a highly

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<sup>18</sup> *International Labour Organization Convention no 169 Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 28 ILM 1382 (1989) [ILO 169].

<sup>19</sup> International Labour Organization and African Commission on Human and People’s Rights, *Overview Report of the Research Project by the International Labour Organization and the African Commission on Human and Peoples’ Rights on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples in 24 African Countries* (Geneva: ILO Publications, 2009) 15 [Overview Report].

<sup>20</sup> *Note by the Chairperson-Rapporteur of Working Group on Indigenous Populations on criteria which might be applied when considering the concept of indigenous peoples*. U.N. Doc E/CN.4/Sub.2/AC.4/1995/3 (June 21, 1995) paras 3, 6, 9, 65.

generalized system of norms. Consequently, indigenous rights do not *stand against*, but instead they in fact *form part of*, a process of *legal nationalization*, in which the central legal/political order of society is extended and reinforced. Indeed, litigation over such rights often assumes particular nation-building significance in social environments, in which more classical instruments of legal and political inclusion – for example, national political parties and collective political organizations – have not been able to galvanize sectoral actors in national society around the political system.<sup>21</sup> In this respect, the assertion of indigenous rights can be seen as a process that intensifies the power of formal state institutions, and connects these institutions more deeply to actors in different parts of national society.<sup>22</sup>

In parallel, third, this article argues that the establishment of indigenous rights reflects a process in which new rights are created within the legal system, as the institutions in national legal system interact with, and extract norms from, the global legal system. These rights are not simply attributable to pre-existing social subjects. The recognition of such rights means that the legal subjectivity of indigenous rights claimants is profoundly transfigured, and, through their acquisition of rights, rights-holding communities are stripped away from the factual societal sub-national collectives to which they are attached, and integrated in a higher-order, increasingly global legal system. In fact, the imputation of rights to indigenous communities dismantles traditional collectivities in society, and it generates new legal collectives, which are materialized through global law, extending deeply into national society. Of course, collective actors in society may expressly comprehend themselves as actors with ethnically founded entitlements, prior to the law. Yet, such entitlements typically become legally real through a process of correlation with global law, and they cannot easily be isolated from more patterns of global norm production. In consequence, the sociological key to the consolidation of indigenous rights lies not in observing indigenous rights as material substances, but in observing the construction of such

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<sup>21</sup> For more typical examples of this process see Daniele Caramani, *The Nationalization of Politics. The Formation of National Electorates* (Cambridge: Cambridge University Press, 2004).

<sup>22</sup> There are many institutional processes that demonstrate how the formal treatment of indigenous questions leads to the institutional extension and solidification of national legal/political systems. In Brazil, the FUNAI, created in 1967, is the principal political agency for indigenous issues and the Public Prosecutor's Officer is the legal representative of indigenous people. Chile has seen the creation of a Ministry of Indigenous Issues. This tendency has culminated in the establishment of new state organs for indigenous questions in post-2009 Bolivia.

rights as a distinctive social process, in which the national legal system develops new instruments to promote the inclusion of social actors that surround it.<sup>23</sup> In this perspective, the attribution of rights to plural social groups is always a process of legal generalization, in which claimants to rights assume a position in an expanding legal community, which is both national and global. As a result, the legal rights accorded to indigenous communities are generated by acts of recognition that are not determined by the social position or inherent practices of these communities, and they are secured through relatively autonomous, increasingly global modes of legal production and inclusion. Beneath the process of indigenous rights formation, we can identify a sociological phenomenon of great significance– that is, namely, that otherwise challenged trajectories of national legal construction often rely on transnational legal categories for their realization.

In consequence, the paradigm required for interpreting rights is not persuasively derived either from classical legal pluralism or from legal mobilization theory. A paradigm for observing the construction of indigenous rights can be based in part on global citizenship theories, which are already established in other areas of legal analysis.<sup>24</sup> From this perspective, acts of litigation for indigenous rights can be viewed as acts that incorporate global norms into national law, or that instil an idea of global citizenship in national citizenship practices. In so doing, these acts also widen the societal reach of national law and national institutions, so that, for reasons addressed below, global law forms a precondition for the social extension of national law.<sup>25</sup> However, a paradigm for observing the construction of indigenous rights might also use elements of Luhmann’s theory of the legal system. In particular, it might examine the formation of indigenous rights as a process which reflects the increasing autonomy of

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<sup>23</sup> This insight is adapted from Niklas Luhmann, who argues that the modern legal system institutionalizes ‘coordinated learning processes’ to adapt to its environment. See Niklas Luhmann, *Rechtssoziologie* (Opladen: Westdeutscher Verlag, 1980) 261.

<sup>24</sup> For analysis of this process in other contexts see Francisco O. Ramirez, Yasemin Soysal & Suzanne Shanahan, ‘The Changing Logic of Political Citizenship: Cross-National Acquisition of Women’s Suffrage Rights, 1890 to 1990’ (1997) 62(5) *American Sociological Review* 735 at 743; Francisco O. Ramirez & John W. Meyer, ‘Toward Post-National Societies and Global Citizenship’ (2012) 4(1) *Multicultural Education Review* 1 at 21.

<sup>25</sup> This second element of the theory is less well established in global citizenship theory. However, this is implied in John W. Meyer, ‘The World-Polity and the Authority of the Nation-State’ in Albert Bergesen, ed, *Studies of the Modern World-System* (New York: Academic Press, 1980) 121. For a parallel attempt to use world citizenship theory to explain indigenous law, arriving at different conclusions, see Erik W. Larson & Roland Aminzade, ‘Nation-States Confront the Global: Discourses of Indigenous Rights in Fiji and Tanzania’ (2007) 48 *The Sociological Quarterly* 801.



national legal systems, in which the allocation of rights to indigenous groups enables the national legal order to promote more even patterns of inclusion, generating rights that can be accessed by, and thus help to integrate, all collective actors.<sup>26</sup> From this perspective, the increasing inclusivity of national law is linked to the fact that the national legal system is locked into an emerging global legal system, and the transmission of rights from the global to the national legal domain acts to intensify the inner-societal penetration of national legal institutions and national legal norms.<sup>27</sup> Seen in this perspective, indigenous rights emerge as articulations of a process of legal differentiation, linked to the increasingly deep interlinkage between national and global law.

On this foundation, this article argues that the subject of indigenous rights can be most accurately understood if it is seen as a phenomenon that is not constructed through material attributes. Of course, some element of anthropological essentialism always survives in law relating to indigeneity, and legal constructions of indigenous rights are never fully devoid of anthropological dimensions. In Brazil, for example, communities can only acquire indigenous status and specific indigenous rights through certification by an external specialist.<sup>28</sup> Legislation in Chile rules that indigenous communities are characterized by certain ethnic distinctions.<sup>29</sup> In some Colombian cases, anthropologists have appeared before the Constitutional Court to explain the needs of indigenous communities in order to determine the extent of their rights.<sup>30</sup> More generally, however, this article shows that indigenous rights are formed outside anthropological structures, and the basic substance of these rights is not extracted from social or anthropological facts. Within the legal system, indigenous rights are generated through certain types of legal case, in which indigenous communities are characteristically involved. Moreover, these rights, generally, do not have an absolutely *sui generis* character, they are claimed and justified on preconditions shared with other subjects, and, above all, *they are often*

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<sup>26</sup> For Luhmann's theory of rights as sources of social inclusion see Niklas Luhmann, *Grundrechte als Institution. Ein Beitrag zur politischen Soziologie* (Berlin: Duncker & Humblot, 1965) 221.

<sup>27</sup> On the inevitable nexus between law's inclusionary functions and the emergence of a global legal system see Niklas Luhmann, *Das Recht der Gesellschaft* (Frankfurt: Suhrkamp, 1993) 571.

<sup>28</sup> See Law No. 6001, *The Indian Statute* (19/11/1973).

<sup>29</sup> See Art 2(c) of Law No 19.253 (1993).

<sup>30</sup> Constitutional Court of Colombia, Decisions T-113/09; T-129/11. In Colombia, a special agency located in the Ministry of the Interior, the Office for Indigenous, Roma and Minorities Affairs, is responsible for carrying out ethnographic studies to classify indigenous communities.

*quite separate from, or only contingently related to, the subjects that claim them.*<sup>31</sup>

Typically, these rights cannot be detached from global patterns of legal evolution, and, as much as they reflect any extra-legal substance, they articulate globally generalized processes of transformation, adaption and inclusion that shape the legal system at the global level. Often, in fact, rights accorded to indigenous peoples actually create the legal subjectivity of these peoples. Outside the law, further, the basic subjects that lay claim to indigenous rights often only come into being on the foundation of global legal norms.<sup>32</sup> Both in their legal and their social construction, indigenous subjects cannot be simply or immediately attached to a material social reality.

In order to comprehend the growing importance of indigenous rights, in sum, some conceptual reorientation is required. Prominent analyses of the claims of indigenous populations have argued that indigenous legal orders are cemented by their opposition to the autonomous functions of the legal system.<sup>33</sup> However, the growing recognition of indigeneity is a manifestation of relatively autonomous patterns of global legal evolution, and, more strictly, of the rise of a relatively autonomous global legal system. None of this implies that growing recognition of indigenous rights does not create room for variable legal orders within national societies. Yet, it implies that the rise of localized legal pluralism is determined, specifically, by the increasingly global self-reproduction of the legal system in its national and its transnational dimensions. At the core of the rising recognition of indigenous rights is a process in which national and global law form relatively autonomous connections, and – paradoxically – this transnational influx

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<sup>31</sup> Even in constitutions that accord extensive rights to indigenous peoples, these peoples are often placed alongside other marginalized and vulnerable subjects. In Art 32 of the Bolivian Constitution, African-Bolivian people enjoy all the economic, social, political and cultural rights that are recognized for rural native indigenous peoples. The Brazilian Constitution (Art 251(1)) states that: ‘The National Government shall protect expressions of popular, indigenous and Afro-Brazilian cultures and those of other participant groups in the process of national civilization.’ In Colombia, the Office for Indigenous, Roma and Minorities Affairs also addresses questions concerning Roma people and LGBT individuals. A different office in the Ministry of Interior is responsible for issues concerning Negro, Creole, and African-Colombian communities. Other commentators have also questioned whether indigenous rights have a fully sui-generis quality. See for instance Jérémie Gilbert, *Indigenous Peoples’ Rights under International Law. From Victims to Actors* (Ardsley, NY: Transnational Publishers, 2006) 121 [Gilbert, *Indigenous Peoples’ Rights*]; Ben Saul, *Indigenous Peoples and Human Rights. International and Regional Jurisprudence* (Oxford: Hart, 2016) 3, 39, 133, 159 [Saul, *Indigenous Peoples and Human Rights*]; Manuela Zips-Mairitsch, *Lost Lands? (Land) Rights of the San in Botswana and the Legal Concept of Indigeneity in Africa* (Münster: Lit, 2013) 94 [Zips-Mairitsch, *Lost Lands?*].

<sup>32</sup> See for examples *infra* pp. XXX.

<sup>33</sup> Boaventura de Sousa Santos, ‘Cuando los excluidos tienen derecho: justicia indígena, plurinacionalidad e interculturalidad’ in Boaventura de Sousa Santos & José Luis Exení Rodríguez, eds, *Justicia indígena, plurinacionalidad e interculturalidad en Bolivia* (Quito: Abya-Yala, 2012) 19.

underpins more uniform processes of national legal inclusion and more robustly integrative patterns of citizenship within national societies.

## **2. Three levels of construction**

This article seeks to comprehend the emergence and position of indigenous rights by building up a profile of these rights as they are established at different levels of the global legal order. To this end, it examines the construction of indigenous rights in three separate domains of the global legal system, that is: 1. *in global international human rights law*; 2. *in regional international human rights law*; 3. *in municipal human rights law*. In particular, it focuses on the formation of indigenous rights on the different planes of the global legal system insofar as these rights relate to indigenous peoples or population groups in Latin America and Africa. These regions are selected for comparative analysis because, in both regions, political contests concerning indigenous rights have recently assumed pressing legal and political relevance, and existing legal instruments have been refined to accommodate a pluralistic legal landscape, in which legal claims of indigenous subjects are salient.<sup>34</sup> Moreover, both these regions have evolved comprehensive legal structures concerned with indigeneity: that is, they possess judicial orders focused on indigenous rights in each domain of global law – in *global international law* (the United Nations (UN) Human Rights System), in *regional international law* (the Inter-American and African Human Rights Systems), and in *domestic law* (national constitutions, statutes, and judicial decisions).<sup>35</sup> Of these regions, Latin America has consolidated a far more extensive corpus of law addressing indigenous rights. However, both regions have acquired a legal apparatus for constructing such rights on each plane of global law. Both regions are, therefore, plausible objects for comparison. Within Latin America and Africa, we aim at broad coverage of all states with extensive legislation and case law relating to indigenous rights, although, at the domestic level, particular emphasis is placed on those national legal systems whose populations are marked by a greater degree of ethnic diversity. By adopting this comprehensive approach, this article aims to explain how indigenous

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<sup>34</sup> Mauro Barelli, 'The Interplay between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights Regime' (2010) 32:4 Human Rights Quarterly 951 at 967 [Barelli, 'The Interplay'].

<sup>35</sup> Other regions with large indigenous populations have not accepted the jurisdiction of courts with supranational jurisdiction. In polities such as Australia, Canada, and the United States indigenous rights have acquired increased importance, but they are not articulated at a regional level.

rights are constructed within the global legal system as a whole, how the legal subjectivity of indigenous rights holders is formed through global law, and how global law shapes legal practices in national societies.

### 3. Global international human rights law

Historically, the ILO was a pioneer in promoting international standards to address the claims of indigenous and tribal peoples. In 1957, the ILO adopted Convention 107, which concerned the protection of indigenous and other tribal or semi-tribal populations in independent countries. ILO 107 received twenty-seven ratifications, and it formed the first endeavour to codify indigenous rights at the level of international law. It attracted severe criticisms for its allegedly paternalist and integrationist tone. However, ILO 107 remained for years the only hard-law international document relating to indigenous and tribal peoples, and it drew attention internationally to the position of indigenous peoples.<sup>36</sup> Subsequently, in the sphere of global international jurisprudence, the Advisory Opinion of the International Court of Justice in *Western Sahara* (1975) marked a watershed moment in the recognition of indigenous and tribal peoples. This opinion declared the concept of *res nullius* inapplicable in territories inhabited by tribes or peoples having a social and political organization.<sup>37</sup>

In 1989, the adoption of ILO 169 reflected a vital change in attitude towards indigenous populations in international law, and it promoted a doctrine, not of assimilationism, but of solidarity, as the premise for their legal recognition.<sup>38</sup> ILO 169 entered into force in 1991, giving formal international protection to a number of collective rights for indigenous peoples. These rights included rights to cultural integrity, to consultation and participation in relevant decision-making processes, to certain forms of self-government, to land occupancy, to territory and resources, and to non-discrimination in the social and economic spheres.<sup>39</sup> Despite the fact that only twenty-two states, most of

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<sup>36</sup> See James Anaya (Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People), *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development*. U.N. Doc. A/HRC/9/9 (Aug. 11, 2008) [Anaya, *Promotion and Protection*].

<sup>37</sup> *Western Sahara, Advisory Opinion*, [1975] I.C.J. Reports 12 at paras 75-83. See also Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester: Manchester University Press, 2002) 82.

<sup>38</sup> Federico Lenzerini, 'Reparations for Indigenous People in International and Comparative Law: An Introduction' in Federico Lenzerini, ed, *Reparations for Indigenous People: International and Comparative Perspectives* (Oxford: Oxford University Press, 2008) 19 [Lenzerini, *Reparations for Indigenous People*].

<sup>39</sup> On the significance of such categories of collective rights see Allen Buchanan, 'The Role of Collective Rights in the Theory of Indigenous Peoples' Rights' (1993) 3 *Transn. Law & Contemp. Politics* 89 at 91.

them in Latin America, have actually ratified ILO 169, the norms embodied in the Convention have been elaborated by other bodies and courts,<sup>40</sup> and it has achieved wide-ranging impact beyond the states that have ratified it. In addition, in 2007, the UN Declaration on the Rights of Indigenous Peoples was formally adopted by 143 Member States of the UN.<sup>41</sup> Although only accorded the status of soft law, the Declaration strongly affirms the rights to self-determination of indigenous peoples. Other international standard-setting instruments, such as the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the Convention on Biological Diversity, and some UNESCO instruments, also provide for the protection of indigenous peoples.<sup>42</sup>

Amongst these agreements, ILO 169 is the most important instrument for protecting indigenous peoples, and it clearly establishes a foundation for the construction of indigenous persons as subjects of international law.<sup>43</sup> As mentioned, this Convention does not provide a generalizable definition of indigenous peoples. Instead, it provides a *statement of coverage*, enumerating groups protected by its provisions. On this basis, the Convention is applicable to the following groups: a) tribal peoples in independent countries, whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially either by their own customs or traditions or by special laws or regulations; b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest, of colonization, or of the establishment of present state boundaries, and who retain some or all of their own social, economic, cultural and political institutions. *Self-identification* as indigenous or tribal is declared the 'fundamental criterion' for determining the groups to which the provisions of the Convention apply (Art 1(2)).

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<sup>40</sup> See Lenzerini, 'Reparations for Indigenous People', supra note 38, at 19.

<sup>41</sup> The General Assembly Resolution 61/295, concerning the Declaration, was adopted a year after its draft submission by the United Nations Human Rights Council. See *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st session, U.N. Doc A/RES/61/295 (2007).

<sup>42</sup> See Benedict Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law' (2002) 34 N. Y. Univ. J. Int. Law Politics 189 at 228.

<sup>43</sup> See Russel Lawrence Barsh, 'Indigenous Peoples in the 1990s: From Object to Subject of International Law' (1994) 7 Harv. Hum. Rts. J. 33 at 66.

In consequence, international bodies pertaining to the UN system have not adopted a final definition of indigeneity or of the characteristics of subjects able to claim indigenous rights.<sup>44</sup> For practical purposes, the commonly accepted understanding of indigeneity is that provided by Martínez Cobo, UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his *Study on the Problem of Discrimination against Indigenous Populations*. This study states that:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.<sup>45</sup>

In these respects, global international law proposes a hybrid definition of indigenous communities. Some elements of this definition appear, at first glance, to be predicated on objectively manifest characteristics. However, the substantial aspects of this definition are tempered by the fact that the actual possession of such characteristics is defined in non-essentialist fashion, as the result of self-identification.<sup>46</sup> Moreover, the long-standing classification of indigeneity as an attribute of ‘non-dominant’ groups creates a definition that is difficult to apply to some countries with multiple ethnic populations, in which certain indigenous groups clearly have a dominant socio-political position. If taken literally, this classification would preclude many indigenous groups in Africa, in particular, from claiming indigeneity. In addition, some rights granted to indigenous communities at a global level are increasingly extended to other

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<sup>44</sup> UN Secretariat of the Permanent Forum on Indigenous Issues, *The Concept of Indigenous Peoples* (Background Paper to Workshop on Data Collection and Disaggregation for Indigenous Peoples, New York, United States, 19–21 January 2004). UN Doc PFII/2004/WS.1/3

<sup>45</sup> José Martínez Cobo, *Study on the Problem of Discrimination against Indigenous Populations: Final report*. U.N. Doc. E/CN.4/Sub.2/1986/7 (1986). Available at:

<https://www.un.org/development/desa/indigenouspeoples/publications/2014/09/martinez-cobo-study/>.

<sup>46</sup> See further discussion infra p. XXX.

communities, with related vulnerabilities. For example, in 2016, the UN Human Rights Council presented to the General Assembly a Draft declaration on the rights of peasants and other people working in rural areas, based on proposals of the international peasants' movement, which also guarantees the right to land for peasant farmers.<sup>47</sup>

Questions concerning the human rights of indigenous peoples have been addressed in the UN since the 1970s. At first, the UN addressed indigenous rights exclusively through its human rights treaty bodies, which monitor the implementation of international human rights treaties. More recently, three organs with specific responsibility for indigenous issues have been created: the Permanent Forum on Indigenous Issues (established in 2000 by the Economic and Social Council), the Expert Mechanism on the Rights of Indigenous People (established in 2007 under the authority of Human Rights Council), and the Special Rapporteur on the rights of indigenous people, whose mandate was established in 2001 under the authority of Human Rights Council. Together, these bodies have adapted general human rights law to indigenous contexts. However, they have not necessarily created new rights or applied rights that are restricted to indigenous people. Decisions of the Human Rights Committee have addressed questions related indigenous peoples concerning discrimination,<sup>48</sup> the right to be consulted,<sup>49</sup> the trafficking of vulnerable groups,<sup>50</sup> health and education,<sup>51</sup> political participation,<sup>52</sup> children's rights,<sup>53</sup> and gender rights.<sup>54</sup> Yet, these decisions do not differentiate strictly between indigenous peoples, people of African descent, women, migrants, persons with disabilities, population of rural areas, and other minorities.

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<sup>47</sup> Human Rights Council, *Draft Declaration on the Rights of Peasants and Other People Working in Rural Areas*. U.N. Doc. A/HRC/WG.15/3/2 at art. 19 of (March 8, 2016). Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/046/42/PDF/G1604642.pdf?OpenElement>.

<sup>48</sup> See Human Rights Committee, Concluding Observations on Peru, CCPR/C/PER/CO/5, 29 April 2013, at para 7; Human Rights Committee, Concluding Observations on Costa Rica, CCPR/C/CRI/CO/6, 22 April 2016, at para 9; Human Rights Committee, Concluding Observations on the Democratic Republic of Congo, CCPR/C/COD/CO/3, 26 April 2006, at para 294; Human Rights Committee, Concluding Observations on Ecuador, CCPR/C/ECU/CO/5, 24 November 2009 at para 19.

<sup>49</sup> See Human Rights Committee, Concluding Observations on Suriname, CCPR/C/SUR/CO/3, 3 December 2015, at para 47.

<sup>50</sup> Human Rights Committee, Concluding Observations on Colombia, CCPR/C/COL/CO/7, 17 November 2016.

<sup>51</sup> Human Rights Committee, Concluding Observations on Nicaragua, CCPR/C/NIC/CO/3, 12 DECEMBER 2008, at paras 20-21; Panama, CCPR/C/PAN/CO/3, 17 APRIL 2008 at para 21.

<sup>52</sup> Human Rights Committee, Concluding Observations on Brazil, CCPR/C/BRA/CO/2, 1 December 2005, at para 10.

<sup>53</sup> Human Rights Committee, Concluding Observations on Paraguay, CCPR/C/PRY/CO/2, 24 April 2006, at para 22.

<sup>54</sup> Human Rights Committee, Concluding Observations on Peru, 15/11/2000. CCPR/CO/70/PER, at para 21.

Overall, global international law does not provide a robust definition of the subjects able to claim indigenous rights. As a result, the definition of indigeneity has acquired more concrete social meaning at subordinate levels of legal construction.

#### 4. Regional international human rights law

##### 4.1 Latin America: The Inter-American Court of Human Rights

In 1989, a Special Working Group operating in cooperation with the Rapporteur on the Rights of Indigenous Peoples within the Inter-American Commission on Human Rights (IACHR) began to prepare a legal instrument concerning the rights of indigenous populations. In 1997, the IACHR approved a draft of an American Declaration on the Rights of Indigenous Peoples. In 2016, the final version of this document was adopted by the General Assembly of the Organization of American States. This Declaration is the first instrument in the history of the Organization that specifically protects the rights of indigenous peoples in the region.<sup>55</sup> In this period, the Inter-American Court of Human Rights (IACtHR) began to decide contentious cases concerning indigenous rights; it was the first international tribunal to do so.<sup>56</sup> Between 1991 and 2017, the IACtHR ruled in twenty-eight such cases against eleven different States; that is, against half of the polities that have, at least temporarily, recognized the contentious jurisdiction of the Court.<sup>57</sup> In the present decade, the IACtHR has already reached fourteen decisions in such cases. Currently, the Court has two additional cases involving indigenous rights at the Merits Stage, pending the delivery of the final judgment.<sup>58</sup> Taken together, these

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<sup>55</sup> See more details about the adoption of the American Declaration on the Rights of Indigenous Peoples at: [http://www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=E-075/16](http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-075/16).

<sup>56</sup> See Inter-American Court of Human Rights [IACtHR], *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001) Series C No.79 [*Mayagna*]. See Laurence Burgogue-Larsen & Amaya Ubeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford: Oxford University Press, 2013 [2011]) 501 [Burgogue-Larsen & Ubeda de Torres, *The Inter-American Court of Human Rights*].

<sup>57</sup> The following States have accepted the jurisdiction of the Inter-American Court of Human Rights: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Perú, Dominican Republic, Suriname and Uruguay. The main exceptions are some Caribbean Islands, the USA and Canada, which means that the Inter-American System pretty is in essence a Latin American instrument. Trinidad and Tobago and Venezuela have denounced the Convention in 1998 and 2012, respectively. Peru withdrew its recognition of the contentious jurisdiction of the Court in 1999, but returned to the System in 2001.

<sup>58</sup> In chronological order up to November 2017, the cases decided by the Court are: *Aloeboetoe et al* (1991), *El Amparo* (1996), *Mayagna (Sumo) Awas Tingni Community* (2001), *Bámaca Velásquez* (2002), *Myrna Mack Chang* (2003), *Plan de Sánchez Massacre* (2004), *Yatama* (2005), *Yakye Axa Indigenous Community* (2005), *Moiwana Community* (2005), *López-Alvarez* (2006), *San'boyamaxa Indigenous Community* (2006), *Saramaka People* (2007), *Escué-Zapata* (2008), *Tiu Tojín* (2008), *Chitay Nech et al* (2010), *Fernández Ortega et al* (2010), *Rosendo Cantú et al* (2010), *Xákmok Kásek Indigenous Community* (2010), *Santo Domingo Massacre* (2012), *Río Negro Massacres* (2012), *Kichwa Indigenous People of Sarayaku* (2012), *Operation Genesis* (2013), *Norin Catrimán* (2014), *Kuna Indigenous People* (2014), *Garífuna Community of Punta Piedra* (2015), *Garífuna Community of Triunfo de la Cruz and its members* (2015), *Kaliña and Lokono* (2015), *Village Chichupac and Neighbour*



numbers represent roughly fifteen per cent of the total number of rulings handed down by the Court. The Court has also adopted broad rules in granting locus standi to indigenous population groups.<sup>59</sup> The achievements of the IACtHR and the IACHR in this area have been clearly recognized in the UN, not lastly for their important normative effect in other regions.<sup>60</sup>

In addressing rights of indigenous population groups, the IACtHR adopts latitude in interpreting indigeneity, and it uses a definition based, not on static identity or fixed group membership, but on flexibly attributed, interpretively constructed entitlements. To be sure, the IACtHR has established certain rights that were ascribed, at least at first, exclusively to indigenous peoples, and it has identified certain rights whose exercise is, primarily, the province of indigenous peoples. By way of example, the list of such rights includes: the right of indigenous communities to be consulted in matters relating to their territories; the right to hold communal property; the right to enjoyment of natural resources on communal territories; the right to utilize traditionally owned lands; within variable constraints, the right to territorial self-determination.<sup>61</sup> Most of these rights are determined by the specific facts of given cases, and they reflect the circumstances in which indigenous groups commonly file suit. For instance, the establishment of these rights is shaped by the fact that indigenous groups are often exposed to eviction, forcible displacement, and territorial deprivation, often resulting from extractivist or developmentalist programmes conducted on their lands. More typically, however, the IACtHR employs a broad approach in defining the subjects to whom rights can be attributed. In fact, the Court has heard cases involving other minority communities exposed to human rights violations, especially government violence, similar to those to which indigenous communities are exposed, and it has recognized these communities as claimants to rights akin to those ascribed to clearly indigenous communities in analogous positions. Some such cases refer to population groups of African descent, whose position is not uncontroversially classifiable as *pre-colonial*. One example is the Maroons (Bush Negroes), a tribal group composed by descendants of Africans, who

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*Communities of Rabinal* (2016). The two cases currently at the merit stage are: *Maurilia Coc Max et al* (Massacre of Xamán), and *Xucurn People and its members*.

<sup>59</sup> See IACtHR, *Sawboyamaxa Indigenous Community v. Paraguay* (2006) Series C No146 [*Sawboyamaxa*].

<sup>60</sup> See Anaya, *Promotion and Protection*, supra note 36 at 32.

<sup>61</sup> These rights are set out in IACtHR, *Saramaka People v. Suriname* (2017) Series C No 172 [*Saramaka*].

were taken to the region of Suriname in the seventeenth century to work as slaves on plantations.<sup>62</sup> A further example is the Honduran Garífunas, a tribal group of persons of mixed African and indigenous descent, who trace their origins to the eighteenth century.<sup>63</sup> In one case, concerning the Moiwana community in Suriname, the Court decided that, although ‘the Moiwana community members are not indigenous to the region’, the communal rights to property accorded to indigenous groups should also be granted to the tribal Moiwana community members. This was justified on grounds that the Moiwanas possess a ‘profound and all-encompassing relationship to their ancestral lands’.<sup>64</sup>

In consequence, the primary tendency of the IACtHR is to adopt a non-essentialist definition of indigeneity and indigenous rights. The Court imputes such rights to subjects, not exclusively on the basis of objectively measured social or cultural attributes, but as part of wider patterns of rights attribution. In consequence, the concept of indigeneity employed by the IACtHR acquires clearest objective meaning, not in any formal or generic sense, but in the particular facts of the cases in which indigenous or similar groups appear before the Court. The Court normally encounters the claims of indigenous communities in a distinctive set of legal contexts, and the construction of indigenous communities and their rights is not easily comprehensible outside such factual settings. Seen in this light, indigeneity emerges as a relatively contingent foundation for rights. In most cases, rights ascribed to indigenous communities are not strictly separable from other primary rights, which are quite generally protected for marginalized social groups, whose property and livelihoods are precarious. In most cases, the rights accorded by the IACtHR to population groups identified as indigenous are extracted from generalized constructions of human rights, and the fact that rights are justified through claims to indigeneity does not substantially determine their content.

#### 4.1.2 Cases of massacres

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<sup>62</sup> See IACtHR, *Aloeboetoe et al. v. Suriname* (1991) Series C No 11; *Moiwana Community v. Suriname* (2005) [*Moiwana*]; and *Saramaka*, supra note 61.

<sup>63</sup> See IACtHR, *López Álvarez v. Honduras* (2006) Series C No.141; *Community Garífuna Triunfo de la Cruz and its Members v. Honduras* (2015) Series C No. 305.

<sup>64</sup> See *Moiwana*, supra note 62, at paras 131-133.

This relative contingency of indigenous rights is illustrated by cases heard by the IACtHR regarding large-scale violence against indigenous groups. Some of the most prominent examples of such cases concern the persecution of members of indigenous communities in the 1980s.

For instance, in *Plan de Sánchez Massacre v. Guatemala* (2004),<sup>65</sup> for instance, the Court condemned the massacre of 268 persons by the Guatemalan Army and civil collaborators, as well as subsequent acts of intimidation and discrimination against survivors and close relatives of the victims. In *Río Negro Massacres v. Guatemala* (2012), the Court condemned massacres perpetrated by the Guatemalan army and civil defence patrols leading to the destruction of the Mayan community of Río Negro.<sup>66</sup> In these cases, the Court recognized the distinct standing of applicants as indigenous communities. In some cases involving massacres against indigenous communities, moreover, the IACtHR has imposed reparatory measures that take into account the cultural particularity of these communities. In *Plan de Sánchez*, it was ruled that, by way of reparation, there should be a public act to acknowledge the responsibility of the State for the violation of indigenous rights, and that this should be conducted both in Spanish and Maya-Achí. In addition, the Court ruled that the State should take steps to improve the infrastructure in communities affected by the massacres, and to create a program to promote the study of Maya-Achí culture.<sup>67</sup>

Despite this, however, remedies provided for indigenous communities in such cases do not vary substantially from those provided in cases of massacres involving non-indigenous groups. For example, remedies in these cases included compensation, rehabilitation (including medical and psychological treatment), the effective location of the victims had been forcibly disappeared, the creation of training courses on human rights for public agents, implementation of development programs and creation of infrastructure for the affected communities. Tellingly, these remedies have also been

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<sup>65</sup> See IACtHR, *Plan de Sánchez Massacre v. Guatemala* (2004) Series C No. 105 at para 2 [*Plan de Sánchez*].

<sup>66</sup> See IACtHR, *Río Negro Massacres v. Guatemala* (2012) Series C No. 250.

<sup>67</sup> See *Plan de Sánchez* at note 65 paras 2, 4, 5, 9.

enforced in cases concerning massacres of which non-indigenous communities were the victims.<sup>68</sup>

#### 4.1.3 Land rights

Due to economic pressures, indigenous and tribal communities in Latin America have been evicted from and deprived of their traditional lands, a condition which often results in lack of housing, and reduced access to health facilities. In some instances, for example, States have granted plots of traditional indigenous territory to private parties involved in projects such as the construction of highways and dams, insisting that economic and national-developmental interests prevail over the right of indigenous and tribal peoples to occupy their ancestral lands.<sup>69</sup> Occasionally, the fact that indigenous groups are removed from traditional lands threatens their survival and integrity.

For these reasons, many cases brought before the IACtHR relating to indigenous rights concern land claims, and the position of indigenous communities is widely addressed in judgements concerning land rights. Central to many such cases is the fact that some defendant States do not accord a distinct juridical personality to indigenous peoples, and, owing to the customary foundations of the system of land tenure used by some indigenous populations, governments do not always recognize them as holding justiciable property rights to ancestral territories and natural resources. For this reason, cases concerning land claims often basic raise questions regarding the applicability of customary law, the legal personality of indigenous communities, and – as a result – the right to remedy of indigenous populations.

The first case in which the IACtHR addressed questions of indigenous land rights was *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001).<sup>70</sup> In hearing this case, the

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<sup>68</sup> See, for example, the structural reparations ordered in *19 Merchants v. Colombia* (2004), *Mapiripán Massacre v. Colombia* (2005), *Ituango Massacres v. Colombia* (2006), *Pueblo Bello Massacre v. Colombia* (2006), *Rochela Massacre v. Colombia* (2008), *Massacre of Santo Domingo v. Colombia* (2013), *Rodríguez Vera et al v. Colombia* (2014).

<sup>69</sup> The construction of the Belo Monte dam, which will be the third-largest dam in the world, is a striking example. This Project has potential impact on the livelihood of twenty-four indigenous communities. On April 2011, the Inter-American Commission on Human Rights granted the Provisional Measure 382/2010, requesting the Brazilian government to suspend the environmental licensing process for the project and to halt construction work. The Provisional Measure did not prevent continuation of the project.

<sup>70</sup> See *Mayagna* supra note 56

Court declared that the State should adopt all measures necessary to create an effective mechanism for marking out and providing titles for the property of indigenous communities, in accordance with their customary law and values. In addition, the Court determined, generally, that a State has the duty to facilitate free, prior and informal consultation with indigenous and tribal peoples about the use of their traditional lands. This right of consultation implies that indigenous communities are entitled to receive information regarding the likely social and environmental impact of any resource exploitation within their territories, and it presupposes the absence of coercion, intimidation or manipulation during the consultation process.<sup>71</sup> Subsequently, in a case against Ecuador, *Kichwa Indigenous People of Sarayaku v Ecuador* (2012), the Court condemned the State because, in the 1990s, it had granted a permit to a private company to carry out oil exploration and extractive activities in the territory of the Kichwa Indigenous People of Sarayaku without having previously consulted with them or obtained their consent.<sup>72</sup>

In developing this case law, the IACtHR has produced a unique line of jurisprudence regarding land rights for indigenous communities. In *Awas Tingni*,<sup>73</sup> the Court became the first international tribunal to recognize the right of an indigenous community to its communal property, regardless of whether it held a formal legal title. Then, in two cases against Suriname, *Saramaka People v Suriname* (2007) and the recent *Kaliña and Lokono Peoples v Suriname* (2015), the Court ruled that States have an obligation to show recognition of the legal personality of indigenous peoples, and such recognition entails recognition of their collective right to property and their right to an effective remedy in cases where this right is violated.<sup>74</sup> Most significantly, the Court has argued that ancestral lands constitute a fundamental precondition for essential aspects of the cultural and spiritual existence of some indigenous groups. As a result, the Court has established a right to property that extends beyond the formal-individualist right to private dominion over goods, indicating that indigenous peoples have a distinctive right to communal property because ownership of land with cultural significance to the life of

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<sup>71</sup> See Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser. L/V/II. Doc 56/09.

<sup>72</sup> See IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador* (2012) Series C No 245.

<sup>73</sup> *Mayagna*, supra note 56.

<sup>74</sup> See *Saramaka*, supra note 61.

the community has implications that exceed considerations of mere personal use or profit.<sup>75</sup> In so doing, the Court has stressed its willingness to adopt an 'evolutionary interpretation of international instruments for the protection of human rights', and so to generate normative constructions for the expansion of more classical property rights.<sup>76</sup>

Some points are of particular note in such cases. First, in these cases, the IACtHR has established certain categories of rights that are typically attributed to indigenous peoples, and it has insisted that States have particular obligations towards such peoples, granting, de facto, a distinct legal personality defined by indigeneity. This applies in particular in the sphere of land and property rights. Second, many rights commonly granted to indigenous peoples entail an extension or an amplification of classical rights, more commonly guaranteed under national and international law. This is usually guaranteed by a jurisprudential technique aimed at widening existing rights.<sup>77</sup> As discussed, land and property rights accorded distinctively to indigenous groups are established through an expansion of rights to private property. They are also determined through the expansion of the right to an effective remedy, which is posited as the basis for the legal personality of indigenous groups. In some cases, indigenous rights have been established through the intensified protection of general rights to equality in international law.<sup>78</sup> However, these rights do not constitute entirely new, or fully distinct rights. On one hand, although it supports the idea of a 'distinctive relationship' between indigenous peoples and their lands, the IACtHR has already affirmed that their property rights are not absolute.<sup>79</sup> Moreover, in recent cases, the IACtHR has addressed land claims of communities of groups other than indigenous people. Examples are *(Operation Genesis) v Colombia* (2013), *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v Panama* (2014) and *Garífuna Punta Piedra Community and its Members v Honduras* (2015). In

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<sup>75</sup> See Gabriela Citroni and Karla Quintana Osuna, 'Reparations for Indigenous Peoples in the Case Law of the Inter-American Court of Human Rights' in Federico Lenzerini ed, *Reparations for Indigenous People: International and Comparative Perspectives* (Oxford: Oxford University Press, 2008) 341.

<sup>76</sup> See *Mayagna*, supra note 56 at para 148.

<sup>77</sup> S. James Anaya, 'International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State' (2004) 21:1 *Ariz. J. Int. Comp. Law* 13 at 44.

<sup>78</sup> In some cases, the IACtHR recognized the right to equality as part of international *jus cogens* to protect indigenous groups. See *Yatama v. Nicaragua* (2005) Series C No.127 at para 184.

<sup>79</sup> See *Yakye Axa Indigenous Community v. Paraguay* (2005) Series C No 125 at para 149 [*Yakye Axa*]; *Saramaka*, supra note 61, at para 127.

these cases, the Court extended the right to traditional lands accepted for indigenous communities to other groups, including communities of African origin. As a result, the Court has indicated that the establishment of juridical personality based in indigeneity is fluid, and rights flowing from indigeneity can be broadened to include other groups for which communally held property is culturally significant.

#### 4.1.4 The right to *vida digna*

Alongside more possessive constructions of land rights, the IACtHR has advanced a more ethically generalized foundation for the defence of indigenous and tribal rights to land. Justification for indigenous rights has been intensified through the notion that land rights are linked to the right to life, and especially the right to '*vida digna*': *life with dignity*.<sup>80</sup>

Originating in the Latin American context in Colombian public law, *vida digna* is one of the most important concepts elaborated by the IACtHR. This concept has been constructed through a comprehensive judicial interpretation of the right to life, enshrined in Article 2 of the American Convention on Human Rights (ACHR), and the Court has expanded this right to establish a series of secondary fundamental rights. In essence, this concept indicates that the right to life is not exhaustively defined as the simple negative right not to be deprived of life. On the contrary, the right to life contains, by inference or by *necessary extension*, a cluster of positive rights, including the right to gain access to the conditions (broadly defined) that guarantee a dignified existence.<sup>81</sup> This concept first appeared in the IACtHR in decisions such as *Villagran Morales (Street Children) v Guatemala* (1999) and *Instituto de Reeducación del Menor v Paraguay* (2004), which addressed legal claims of acutely marginalized social groups. However, it is now commonly applied in cases involving indigenous people. In such cases, this concept is used to indicate that indigenous persons have a right to own, or at least not to be involuntarily removed from, their ancestral lands because of the fact that these lands are *culturally fundamental* to their well-being and to their ability to live

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<sup>80</sup> See Jo M. Pasqualucci, 'The Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System' (2008) 31 Hastings Int'l & Comp. L. Rev. 1; Steven R. Keener & Javier Vasquez, 'A Life Worth Living: Enforcement of the Right to Health through the Right to Life in the Inter-American Court of Human Rights' (2009) 40 Colum. Hum. Rts. L. Rev. 596.

<sup>81</sup> Jo Pasqualucci, 'The Evolution of International Indigenous Rights in the Inter-American Human Rights System' (2006) 6:2 Human Rights Law Review 281 at 299.

their lives in dignified fashion.<sup>82</sup> As a result, rights of access to, and use of, particular lands are established through a transformative reading of the right to life, which is broadened into a right to live in a dignified fashion.

In this respect, the IACtHR has established material rights that have a particular bearing on the legal claims of indigenous groups, and which provide legal grounds that specifically favour indigenous claims. However, as in other cases, these rights do not exclusively belong to indigenous persons. Importantly, the right to dignified life does not originate in cases concerning indigenous groups. Moreover, these rights are not qualitatively free-standing. On the contrary, as in other cases, they are extracted from other primary rights, and they are only contextually applied to indigenous groups. Most significantly, in fact, the concept of *vida digna* has been devised in order to ensure that distinct rights for indigenous peoples can be substantiated, *not* on grounds of static ethnic or territorial belonging, but by imagining indigenous communities, like other communities, as holistic holders of rights.

In the IACtHR, in sum, there has been extensive engagement with indigenous rights. As discussed below, the jurisprudence of the IACtHR had deep impact on the construction of indigenous rights in different parts of the globe.<sup>83</sup> However, even in the case law of the IACtHR, such rights are only marginally founded in indigeneity. They originate in a wider system of global rights.

#### 4.2 Africa: The African Commission and the African Court of Human and Peoples' Rights

In general, the recognition of indigeneity as the basis for legal personality and for distinctive sets of rights in African regional international judicial bodies has been more circumspect than in Latin America. The African regional human rights instrument, the African Charter on Human and Peoples' Rights, expressly provides for collective rights, and it gives strong protection to cultural rights, which might be seen to incorporate indigenous rights.<sup>84</sup> Despite this, however, the Charter possesses a state-centric

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<sup>82</sup> The concept of *vida digna* is associated with the indigenous right to property in three IACtHR cases involving Paraguay. See *Yakye Axa*, supra note 79 at para 161; *Samboyamaxa*, supra note 59 at para 214-217; and *Xákmok Kásek Indigenous Community v. Paraguay* (2010) Series C No 214. For comment see Thomas Antkowiak 'Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court' (2014) 35:1 Univ. Pa. J. Int. Law 113.

<sup>83</sup> See infra p. XXX

<sup>84</sup> Saul, *Indigenous Peoples and Human Rights*, supra note 31 at 204.



emphasis,<sup>85</sup> and regional recognition of rights attached to indigeneity remains cautious.<sup>86</sup>

There are many obvious societal reasons for the reluctance of the African Charter to isolate indigenous affiliation as a source of distinctive legal status. First, not unreasonably, it is often taken as orthodoxy that all African peoples are indigenous to Africa.<sup>87</sup> Moreover, there remains deep anxiety in Africa that the reference to indigeneity to support distinctive claims to legal or political rights might induce or exacerbate conflicts between different communities.<sup>88</sup> Tellingly, in a draft Aide Memoire of the African Group in the UN regarding the UN Declaration on the Rights of Indigenous Peoples, it was observed that the question of indigenous rights should be approached with caution because many African states were 'still recovering from the effects of ethnic based conflicts'.<sup>89</sup> In addition, the concept of indigeneity is often rejected in Africa because it is seen as raising the spectre that distinct population groups might seek secession from existing nation-states, causing further depletion of already weak state institutions. In the longer period of decolonization, African states routinely adopted very defensive conceptions of state sovereignty, and both single governments and inter-state agreements refused to acknowledge claims to autonomy or partial autonomy by ethnically distinct populations.<sup>90</sup> Indicatively, the Organization of African Unity (OAU) refused to recognize claims to indigenous self-determination because of the potential challenges to the territorial integrity of national states that might result from this.<sup>91</sup> In its Advisory Opinion regarding the UN Declaration on Indigenous Rights,

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<sup>85</sup> Richard N. Kiwanuka, 'The Meaning of "People" in the African Charter on Human and Peoples' Rights' (1988) 82:1 AJIL 80 at 96.

<sup>86</sup> See Frans Viljoehn, *International Human Rights in Africa*, 2<sup>nd</sup> ed (Oxford: Oxford University Press, 2012) 230 [Viljoehn, *International Human Rights*].

<sup>87</sup> See International Work Group for Indigenous Affairs, *Indigenous Peoples in Africa: The Forgotten Peoples? The African Commission's work on indigenous peoples in Africa on Human and Peoples' Rights* (Copenhagen: Eks/Skolens Trykkeri, 2006) 12. For a comment see Barelli, 'The Interplay' supra note 34 at 958; and Amelia Cook & Jeremy Sarkin, 'Who is Indigenous? Indigenous Rights Globally, in Africa, and among the San in Botswana' (2009) 18 Tul. J. Int'l & Comp. L. 93 at 105.

<sup>88</sup> See Pauline E. Peters, 'Conflicts over Land and Threats to Customary Tenure in Africa' (2013) African Affairs 1 at 13. Here it is observed that any legal authorization of persons or groups to assert 'claims of greater indigeneity than others carries with it a danger of civil conflict'.

<sup>89</sup> Africa Group, *Draft Aide Memoire*, Unpublished Manuscript, [https://www.ipacc.org.za/images/reports/human-rights/Africa\\_Group\\_Aide\\_Memoire\\_2006.pdf](https://www.ipacc.org.za/images/reports/human-rights/Africa_Group_Aide_Memoire_2006.pdf).

<sup>90</sup> See Felix Mukwiza Ndahinda, *Indigeness in Africa. A Contested Legal Framework for Empowerment of 'Marginalized' Communities* (The Hague: Asser, 2011) 171.

<sup>91</sup> The Cairo Declaration of the Organization of African Unity (OAU) in 1964 underlined this principle. This Declaration stated that borders put in place by colonial powers must be recognized, thus preventing secession by ethnic groups. See *Resolution on Border Disputes Among African States*. OAU Document AHG/Res. 16(I).

the African Commission itself struck a cautious note concerning implementation of international norms, stating that it supported ‘the protection of the rights of Indigenous Populations within the context of a strict respect for the inviolability of borders and of the obligation to preserve the territorial integrity of State Parties’.<sup>92</sup> On these grounds, essentialist use of the concept of indigeneity can easily appear as an obstacle to recognition of indigenous rights in Africa.<sup>93</sup>

In recent years, nonetheless, the balance of opinion in Africa has become more accommodating towards concepts of indigeneity, and the African Commission has begun to establish a distinct body of reasoning regarding indigenous rights.<sup>94</sup> Amongst other sources, this is reflected in a Report produced by a Working Group of Experts on Indigenous Populations/Communities in Africa, established by the African Commission.<sup>95</sup> In this Report, the Working Group proposed an account of indigenous rights, which was designed to adapt the concept to political realities in Africa, limiting the threat of secession and social fragmentation. This Report stated that the quality of indigeneity can be assumed by groups claiming ‘a special attachment to and use of their traditional land’, such that ‘ancestral land and territory has a fundamental importance for their collective physical and cultural survival as peoples’. It also stated that legal provisions concerning indigenous persons should be designed to protect ‘disadvantaged, marginalized and excluded groups’.<sup>96</sup>

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<sup>92</sup> African Commission on Human and Peoples Rights, *Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples*, 41st Session (May 2007). See [http://www.achpr.org/files/special-mechanisms/indigenous-populations/un\\_advisory\\_opinion\\_idp\\_eng.pdf](http://www.achpr.org/files/special-mechanisms/indigenous-populations/un_advisory_opinion_idp_eng.pdf).

<sup>93</sup> On this point and on the resultant importance of self-identification as an opening for claims to indigenous rights in Africa see Dorothy L. Hodgson, *Being Maasai, Becoming Indigenous. Postcolonial Politics in a Neoliberal World* (Bloomington, IND.: Indiana University Press, 2011) 37-38.

<sup>94</sup> See *infra* at p. XXX.

<sup>95</sup> The name of this Working Group itself implies reticence in the use of the concept of indigenous peoples. Initially, the Commission rejected the idea of establishing such a Working Group, stating that it ‘did not find the term “indigenous peoples” applicable to African conditions’: George Mukundi Wachura and Tuuli Karjala, ‘Advocacy for Indigenous Peoples’ Rights in Africa. Dynamics, Methods and Mechanisms’ in Ridwan Laher & Korir Sing’oei (eds), *Indigenous Peoples in Africa. Contestations, Empowerment and Group Rights* (Pretoria: Africa Institute of South Africa, 2014) 107.

<sup>96</sup> See African Commission’s Working Group of Experts on Indigenous Populations/Communities, *Report* (2005) 93, at [http://www.iwgia.org/iwgia\\_files\\_publications\\_files/African\\_Commission\\_book.pdf](http://www.iwgia.org/iwgia_files_publications_files/African_Commission_book.pdf). [African Commission’s Working Group of Experts on Indigenous Populations/Communities, *Report*]. For comment see Viljoehn, *International Human Rights*, *supra* note 86 at 231.

In addition, the concept of indigeneity has been cautiously recognized in judicial rulings of the African Commission.<sup>97</sup> The first such case was *Katangese Peoples' Congress v Zaire* (1995), although in this case the Commission did not decide in favour of the community in question.<sup>98</sup> Favourable recognition of specific group rights was obtained by indigenous communities in later cases brought to the Commission, notably *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (2001) and *Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* (2009).

In the first of these cases, indicatively, which concerned attacks by employees of oil companies in Nigeria on members of the Ongoni people, the word 'indigenous' was not expressly used. However, the Commission stipulated that in future 'communities likely to be affected by oil operations' should receive 'information on health and environmental risks and meaningful access to regulatory and decision-making bodies', and companies should create 'meaningful opportunities for individuals to be heard and to participate in the development of decisions'.<sup>99</sup> This effectively established a right to consultation for distinctive and separately defined communities in matters affecting their vital interests. In the second case, which concerned 'violations resulting from the displacement of the Endorois community' in Kenya, the Endorois people were clearly identified as an indigenous community.<sup>100</sup> Eventually, the Commission decided that the respondent State (Kenya) had to recognise that the Endorois possess rights of collective ownership. To a limited degree, this ruling entailed a relativization of formal property rights in favour of communal property. As a result, the respondent State was informed of its 'duty to evaluate' whether a restriction of private property rights 'is necessary to preserve the survival of the Endorois community'.<sup>101</sup> Importantly, remedies in this case were justified primarily by the fact that the Endorois were deemed, through their resettlement, to have been deprived of access to water.<sup>102</sup>

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<sup>97</sup> African Commission on Human and Peoples' Rights, *Katangese Peoples' Congress v. Zaire*, Communication No. 75/92 (1995).

<sup>98</sup> See discussion in Solomon A. Dersso, 'The Jurisprudence of the African Commission on Human and Peoples' Rights with Respect to Peoples' Rights' (2006) 6 Afr. Hum. Rights Law J 358 at 366.

<sup>99</sup> African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center (SERAC) and the Centre for Economic and Social Rights (CESR) v. Nigeria*, Communication No.155/96 (2001). Available at: <http://www.achpr.org/communications/decision/155.96/>.

<sup>100</sup> Ibid at para 79.

<sup>101</sup> Ibid at para 267.

<sup>102</sup> Ibid at para 4.

This line of jurisprudence has recently been reinforced in the African Court on Human and Peoples' Rights, in a case regarding the forcible eviction of the Ogiek forest dwellers by the Kenyan government.<sup>103</sup> This is the first and (to date) only time the African Court has ruled on an indigenous rights' case. In this case, the Court made provisional orders in 2013, to the effect that Ogiek land rights should be protected. In the final ruling, the Court noted 'that the concept of indigenous population is not defined in the Charter', and that 'there is no universally accepted definition of "indigenous population" in other international human rights instruments'.<sup>104</sup> However, the Court recognized that the Ogieks had legitimate claim to indigeneity, and that certain rights flow from indigeneity. The Court established the indigeneity of the Ogieks on grounds of their strong attachment to their traditional land, and of their cultural distinctiveness.<sup>105</sup> However, specific rights were granted to the Ogieks primarily through the extension of rights to property, life and religious freedom.<sup>106</sup> Importantly, the Court based these rights in part on the right-to-life jurisprudence of the IACtHR, following Latin American reasoning in constructing indigenous rights largely on the foundation of other more generalized rights.<sup>107</sup>

These cases provide clear evidence of growing protection for indigenous rights in Africa. Yet, for all their importance in proposing an expansive construction of the right to property and of the right to life,<sup>108</sup> cases heard in the African human rights system do not establish indigenous rights beyond the lines of reasoning pursued in the IACtHR. In leading cases, the land rights granted to indigenous groups have been primarily extracted from other rights, especially rights to religious freedom and resources, which, under increasingly solid international norms, can be claimed by all persons. In some rulings, certain privileges have been cautiously ascribed to indigenous groups, on the

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<sup>103</sup> See African Court on Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. the Republic of Kenya*, Application No. 006/2012, Order of Provisional Measures (5 March 2013) at para 4.

<sup>104</sup> African Court on Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. the Republic of Kenya*, Application No. 006/2012 (2013), Judgment (26 May 2017) at para 105. [*African Commission on Human and Peoples' Rights v. the Republic of Kenya*].

<sup>105</sup> Ibid at para 107

<sup>106</sup> Ibid at paras 153, 163-169.

<sup>107</sup> Ibid at para 107. For parallel discussion see Mattias Åhrén, *Indigenous Peoples' Status in the International Legal System* (Oxford: Oxford University Press, 2016) 182.

<sup>108</sup> See Saul, *Indigenous Peoples and Human Rights*, supra note 31 at 162.

basis of their distinctively socially marginalized position.<sup>109</sup> In such instances, nonetheless, care has been taken not to utilize a construction of indigenous entitlements that attaches superior rights to indigenous groups. As mentioned, the reasoning of the African Commission is underpinned by the principle that it only acknowledges indigeneity in the ‘analytical form of the concept’ which can be used by ‘marginalized groups’ in order ‘to draw attention to and alleviate the particular form of discrimination they suffer from’.<sup>110</sup>

## **5. Municipal Human Rights Law**

### **5.1 Municipal Human Rights Law in Latin American States**

#### **5.1.1 Constitutional and Statutory Law**

At the level of constitutional law, many Latin American states make a range of protective provisions for the rights of indigenous communities. These rights are usually less formalized in states, such as Chile, Argentina and Brazil, which have not obtained new constitutions since 1989, when ILO 169 was adopted. However, these rights are given high formal standing in Colombia, Ecuador, and Bolivia, where new constitutions have been adopted since 1989, and in Mexico, where extensive constitutional reform was conducted in 2011. For example, Article 246 of the Colombian Constitution (1991) permits authorities of indigenous peoples to exercise some jurisdictional functions within their territories in accordance with their own laws and procedures. Article 257 of the Constitution of Ecuador (2008) provides for the formation of indigenous or Afro-Ecuadorian territorial districts. Article 30 of the Bolivian Constitution (2009) protects cultural rights and rights of consultation for indigenous peoples. Articles 289-296 provide for certain powers of indigenous self-government, and they establish a framework in which indigenous communities can acquire formal autonomy (as *autonomías*). Article 192(3) declares that the state will reinforce indigenous justice. Indeed, the constitution adopts as a basic norm that indigenous courts form an equally ranked part of the legal system as a whole.

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<sup>109</sup> In the *Endorois* case, it was found that natural resources contained in traditional lands are vested in indigenous people, and indigenous groups have a right to such resources. See African Commission on Human and Peoples’ Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003 (2010). Available at <http://www.achpr.org/communications/decision/276.03/>. at para 255, 268.

<sup>110</sup> See African Commission’s Working Group of Experts on Indigenous Populations/Communities, *Report*, supra note 96, at 88. See also *African Commission on Human and Peoples’ Rights v. the Republic of Kenya*, supra note 104 at para 111.

Generally, the constitutional protection of indigenous rights in Latin America is not easy to separate from international legal norms, and such protection cannot be seen as the outcome of purely domestic arrangements. For example, the Colombian constitution of 1991 was created by a constituent assembly, in which, amongst a range of parties engaged in the long-standing civil conflict in Colombia, indigenous groups were represented. However, debates in the assembly were partly pre-configured by international human rights norms, which had penetrated deep into Colombian society in the 1980s, as international organizations had become more involved in the Colombian conflict.<sup>111</sup> The drafting of the Constitution also coincided with Colombia's ratification of ILO 169, and provisions of ILO 169 appear directly in Article 246 of the Constitution. Indigenous groups were also extensively involved in the writing of the Bolivian Constitution of 2009, and the constitution-making process in Bolivia was partly driven by indigenous mobilization. In this context, however, ILO 169, which had been drafted under Bolivian supervision and rapidly incorporated in Bolivian law, acquired the status of a pre-constitutional principle,<sup>112</sup> providing a prior guarantee for recognition of indigenous rights during the constitution-making process.<sup>113</sup> In each example, indigenous groups were able to claim rights because of the openings and opportunities provided by international law.

### 5.1.2 Jurisprudence of Superior Courts

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<sup>111</sup> See Jacobo Grajales, *Gobernar en medio de la violencia. Estado y paramilitarismo en Colombia* (Bogotá: Editorial Universidad del Rosario, 2017), 158-60; Alexandra Huneus, 'Constitutional Lawyers and the Inter-American Court's Varied Authority' (2016) 79 *Law & Contemp. Probs.* 179 at 187-188.

<sup>112</sup> According to a senior government official, international law constituted the legal foundation for the Bolivian constitution. Moreover, it framed and gave impetus to the internal disputes which led to the constitution, and it provided a basis for laws of 1994 and 1996 whose provisions for indigenous rights were later reflected and reinforced in the final constitution. Interview conducted with Gonzalo Vargas, Vice-Minister for Autonomous Indigenous Communities of Bolivia, 6<sup>th</sup> of April of 2016. On the gradual cementing of a definition of indigeneity in Bolivia after ratification of ILO 169 see Andrew Canessa, 'Who is Indigenous? Self-Identification, Indigeneity, and Claims to Justice in Contemporary Bolivia' (2007) 36:3 *Urban Anthropology and Studies of Cultural Systems and World Economic Development* 195 at 203. On reference to ILO 169 in the Constituent Assembly in Bolivia see Salvador Schavelzon, *El nacimiento del estado plurinacional de Bolivia. Etnografía de una Asamblea Constituyente* (La Paz: CLACSO, 2012) 179, 182, 200.

<sup>113</sup> One account argues that international instruments regarding human rights and indigenous rights were the 'direct source' for the recognition of indigenous communities as distinct actors at this time: Leonardo Tamburini, 'La jurisdicción indígena y las autonomías indígenas' in Bouventura de Sousa Santos & José Luis Exení Rodríguez, eds, *Justicia indígena, plurinacionalidad e interculturalidad en Bolivia* (Quito: Abya-Yala, 2012) 250-51 [Tamburini, 'La jurisdicción indígena']. On the impact of international law on the 2008 Constitution of Ecuador see Marcelo Bonilla Urvina, 'Pluralismo jurídico en el Ecuador. Hegemonía estatal y lucha por el reconocimiento de justicia indígena' in Rudolf Huber, Juan Carlos Martínez, Cécile Lachenal & Rosembert Ariza, eds, *Hacia sistemas jurídicos plurales. Reflexiones y experiencias de coordinación entre el derecho estatal y el derecho indígena* (Bogotá: Konrad Adenauer Stiftung, 2008) 51.

The key patterns of recognition for indigenous rights in Latin America are visible, not in constitutional provisions, but in the jurisprudence of superior courts, giving effect to general provisions concerning indigenous groups. In this regard, most case law in Latin America follows the tendencies discussed above, and it falls short of granting fully sui-generis rights to indigenous groups. In fact, most rights ascribed to groups claiming rights founded in indigeneity amplify the substance of already existing rights, albeit often using affiliation to an ethnic or sub-national group as grounds for the expansionary construction of such rights.

#### 5.1.2.1 Land rights

As at the regional international level, indigenous rights acquire extensive domestic coverage in Latin America in the area of land law. Recognition of land rights for indigenous groups appears in a broad spectrum of case law, and it ranges from relatively restrictive to relatively expansive rulings.

At the relatively restrictive end of the spectrum, the Brazilian Supreme Court has recognized claims to land rights by indigenous population groups, notably in *Raposa Serra do Sol* (2009).<sup>114</sup> Less restricted land rights have been granted in other jurisdictions, even in those that have not acquired new constitutions since the approval of ILO 169. In Peru, the Constitutional Court has affirmed the land rights of indigenous communities in cases where external companies have claimed extractive powers over natural resources.<sup>115</sup> Indeed, the Court has indicated that indigenous communities possess free-standing judicial competences to determine such cases. In Bolivia, where indigenous rights are subject, notionally, to a high degree of entrenchment, land rights are covered by a special legal regime, on the grounds that land is essential for the survival of indigenous communities. In fact, the Bolivian Constitutional Court has construed land rights as essential preconditions for the realization of other, more robustly protected rights, such as the right to work and the right to water. Still more expansively, it has declared that all persons have a right to inhabit an environment that is conducive to a dignified familial and communal life. As a result, it has stated, following ILO 169, that the right to a decent living environment means that indigenous

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<sup>114</sup> Brazilian Federal Supreme Court, PET 3388/RR, Relator: Carlos Britto, 03.04.2009, D.J.e., 16.04.2009.

<sup>115</sup> See Constitutional Court of Peru, *Comunidad Nativa Tres Islas Y Otros* EXP. N° 01126-2011-PHC/TC (2011).

communities are entitled to assume free control of their territory, and to assert collective ownership of land.<sup>116</sup> From an early stage, the Colombian Constitutional Court recognized indigenous land rights as protected by rights to collective ownership.<sup>117</sup>

In most countries in Latin America, land rights of indigenous communities assume greatest meaning and importance, not as rights to collective titles, but as rights to consultation in matters concerning projects affecting the use of indigenous territories and the resources that they contain.

In Brazil, for instance, the Office of the Public Prosecutor has repeatedly emphasized the existence of a duty of consultation with indigenous communities in cases in which major infrastructural projects have been initiated.<sup>118</sup> The Chilean Supreme Court has ruled that ILO 169 requires the holding of consultative meetings in every administrative proceeding that could affect an indigenous community, and that consultation must give real opportunities for communities to influence the execution of a given project.<sup>119</sup> In Guatemala, the Constitutional Court has found a duty to consult indigenous groups prior to commencement of mining works.<sup>120</sup> In Peru, the Constitutional Court has followed ILO 169 to establish rights to consultation, under state supervision, for indigenous communities affected by extractivist initiatives.<sup>121</sup> Consultation was also declared necessary in Peru in business ventures curtailing access to natural resources for indigenous populations.<sup>122</sup> In Bolivia, the superior courts have, albeit restrictedly, made use of ILO 169 to recognize the formal duty of planners and officials to consult indigenous populations in ventures in which minerals and sub-soil resources are to be extracted.<sup>123</sup> The Colombian Constitutional Court has also ruled that consultation with indigenous groups is mandatory when exploitation of resources directly affects the

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<sup>116</sup> Plurinational Constitutional Court of Bolivia, Decision 0572/2014.

<sup>117</sup> Constitutional Court of Colombia, Decision, T-257/93.

<sup>118</sup> See for example Federal Regional Court-1 (Brazil), *Usina Hidrelétrica de São Luiz do Tapajós – Ação Civil Pública* n° 3883-98.2012.4.01.3902 (15.06.2015) [Ação Civil Pública n° 3883-98.2012.4.01.3902].

<sup>119</sup> Supreme Court of Chile, *Comunidad Indígena Antú Lafquén de Huentetique con Corema de la Región de los Lagos*, Protección, rol 10.090-2011 (2012).

<sup>120</sup> Guatemala, Corte de Constitucionalidad, Sentencia Expedientes 1643-2005 y 1654-2005 (28/02/2008).

<sup>121</sup> See Constitutional Court of Peru, “Asociación Interétnica de Desarrollo de la Selva Peruana (AIDSESP) v Ministerio de Energía y Minas y Otros”. 06316-2008-AA, Decision 11/11/2009 [Asociación Interétnica de Desarrollo].

<sup>122</sup> Constitutional Court of Peru, “Jaime Hans, Bustamante Johnson v Empresa Occidental Petrolera del Peru LLC Sucursal del Peru y Otros”. 03343-2007-AA, Decision 19/02/2009.

<sup>123</sup> Plurinational Constitutional Court of Bolivia, Decision 2003/2010.



interests of indigenous communities.<sup>124</sup> In one case, the Constitutional Court invalidated an entire piece of legislation owing to lack of prior consultation with indigenous communities.<sup>125</sup>

Rights to land are clearly of the highest importance for the wellbeing of indigenous communities. However, as in other cases, the right of indigenous peoples to collective ownership of land is not established as a fully free-standing right in the jurisprudence of leading Latin American courts. In fact, this right is commonly defined, in part, through connection with other rights, including, in particular, rights of access to vital resources, especially water.<sup>126</sup> Similarly, rights of consultation in matters relating to land use are of the highest importance for indigenous communities. Nonetheless, as acknowledged in Latin American courts, these rights are also not of a sui-generis nature. In some countries, for example, the right to be consulted is not exclusive to indigenous population groups, but has been extended to other groups affected by extractivist initiatives. Qualification for such rights can encompass a variety of marginalized groups, including river-dwelling communities, and people of African descent.<sup>127</sup> Moreover, when ascribed specifically to indigenous peoples, the rights to consultation are widely patterned on rights that are also granted, less differentially, to other subjects. For instance, the Colombian Constitutional Court, which has established strong protection for prior consultation, has often defined indigenous groups as ‘subjects of especial constitutional protection’.<sup>128</sup> However, the Court has constructed the right to consultation required by indigenous peoples as one based in more broadly established rights of ‘effective participation’, which are strictly guaranteed by the Constitution. Additionally, it has described mechanisms for ensuring such rights as ‘analogous to those conferred by the legal order’ on other disadvantaged social groups in national society.<sup>129</sup> In the first instance, therefore, the Court has assigned rights of consultation to indigenous peoples, not primarily on grounds of indigeneity, but as a means of

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<sup>124</sup> Constitutional Court of Colombia, Decision C-208/2007.

<sup>125</sup> Constitutional Court of Colombia, Decision C-030/2008.

<sup>126</sup> See Supreme Court of Chile, “Sociedad Agua Mineral Chusmiza SAIC v Comunidad Indígena Aimara Chusmiza y Usmagama”. Rol de la causa: 2840-2008, Recurso; Plurinational Constitutional Court of Bolivia, Decision 2180/2012; Constitutional Court of Ecuador, *Claudio Mueckay Arcos v. Dirección Regional de Minería de Pichincha: Director Regional*, No. 170-2002-RA (2002).

<sup>127</sup> See Ação Civil Pública nº 3883-98.2012.4.01.3902, supra note 118. In this case, the right to free, prior and informed consultation granted to indigenous people was extended to other ‘traditional communities’.

<sup>128</sup> Constitutional Court of Colombia, Decision T-766/15.

<sup>129</sup> Constitutional Court of Colombia, Decision C-175/09.

compensatory social inclusion. In fact, the establishment of this right in Colombia was expressly designed to place indigenous groups in the same legal-political position as other political subjects. The Colombian Constitutional Court has also established land rights, linked to the right to *vida digna*, for victims of large-scale evictions who are not indigenous.<sup>130</sup>

In sum, the right of indigenous communities to gain access to, and protection for, communal land is not a fully free-standing right in Latin American societies. Notably, the most robust protection is given, not to land ownership in the strict sense, but to rights of consultation regarding construction activities, mining, and other processes of resource extraction conducted in indigenous territories. Moreover, these rights are rarely defined in absolute terms. As discussed, they are often analogous to participatory rights granted to other social groups and to members of other public bodies. They are also often founded, in essence, on an expansionary reading of more generally protected rights, such as the right to life, or the right to resources required for subsistence. Further, few such rights are allocated to indigenous groups on the basis of categorically distinct or generic attributes. Indeed, the dominant lines of judicial reasoning suggest that such rights are most securely protected, not where they are based in indigeneity, but where they are defined and interpreted in conjunction with more widely established rights.

#### 5.1.2.2 Rights to exercise communal justice

As mentioned, many constitutions in Latin America contain clauses that provide for comprehensive rights of legal and political autonomy for indigenous communities. Important in this regard, however, is the fact that, in comparison to protection for (broadly defined) property rights, rights permitting active self-determination by indigenous groups are normally subject to limiting interpretation by Latin American courts.<sup>131</sup> Active indigenous rights, exercisable through patterns of judicial independence not sanctioned under primary subjective rights, are usually quite strictly circumscribed. In this regard, as a result, widely guaranteed indigenous rights do not differ substantially from common civil rights.

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<sup>130</sup> Constitutional Court of Colombia, Decision T-267/11.

<sup>131</sup> Gilbert, *Indigenous Peoples' Rights*, supra note 31, discussing the limited character of this right.

This becomes visible, first, in rights of judicial self-administration. As mentioned above, a number of domestic constitutions in Latin America formally permit the exercise of judicial autonomy by indigenous communities, in some cases allowing the institution of special courts to address communal legal problems. In some cases, these provisions have been modified by subsequent statutes. In Bolivia, statutory norms regarding indigenous justice are restrictive, prohibiting the application of customary indigenous laws in all cases with implications for criminal law or human rights law.<sup>132</sup> More generally, however, rights to autonomous exercise of judicial authority by indigenous peoples are realized in relevant rulings of superior ordinary courts, which supervise judicial procedures in indigenous communities. In particular, cases concerning indigenous justice are normally brought before superior courts when they concern conflicts between indigenous justice and national law, or – more importantly – when they reflect conflicts between indigenous justice and international law, especially in the administration of criminal penalties. Notably, in most Latin American states, national human rights law is officially aligned to international human rights standards, as defined either by the UN or by the ACHR and the jurisprudence of the IACtHR.<sup>133</sup> This means that, in cases of conflict, international law, especially ILO 169, is used both to protect indigenous rights and, equally, to place formal limits on the judicial powers that can be assumed by indigenous populations.

The relevant rulings of the Constitutional Court in Colombia are illuminating in this regard. From an early stage, the Court established an influential framework for the exercise of indigenous autonomy. This framework is based expressly in the assumption that international norms regarding indigenous peoples, especially ILO 169, are to be interpreted as forming part of domestic constitutional law (the block of constitutionality).<sup>134</sup> At one level, the Court has adopted a policy of *maximization* in addressing indigenous judicial rights. It has argued that ‘a high degree of autonomy’ is a precondition for the survival of indigenous communities, and that ‘maximization of the

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<sup>132</sup> See the curbs placed on indigenous justice in Bolivia by Ley 073/2010 de Deslinde Jurisdiccional [Law No.73/2010 for the Demarcation of Jurisdiction].

<sup>133</sup> Colombia the Constitutional Court has developed the doctrine of the ‘block of constitutionality’, by means of which it is allowed to integrate internationally constructed rights directly into domestic law. See the classic statement of this doctrine in Constitutional Court of Colombia, Decision C-225/95.

<sup>134</sup> See Constitutional Court of Colombia, Decision T-778/05.

autonomy of indigenous communities’ and ‘minimization of the restrictions’ imposed on the exercise of such autonomy should be viewed as a rule in relevant jurisprudence.<sup>135</sup> At the same time, the Court has determined that indigenous judicial liberties have to be limited in cases in which they conflict with a small ‘essential nucleus’ of rights that possess obvious higher-order standing in Colombian constitutional law as a whole, and which also form part of the block of constitutionality: that is, with the right to life, the right not to be tortured, the right to due process, and minimal rights of subsistence.<sup>136</sup> In Colombia, therefore, judges addressing cases in which the exercise of indigenous self-determination has engendered conflicts with other high-ranking rights have applied standards of proportionality – of ‘rational evaluation’ – to assess which of the conflicting rights should ‘enjoy greater weight’.<sup>137</sup> In such cases, the national courts have typically used international laws, including ILO 169, not only to uphold indigenous judicial autonomy, but also to define the extent of its legitimate reach.<sup>138</sup> The courts have shown some flexibility and leeway in this process.<sup>139</sup> Yet, where a clear conflict occurs between national-constitutional or international norms and indigenous law, the rights established in the former have been accorded indubitable primacy. The principle of maximization in Colombian constitutional law, therefore, is used both to establish preconditions for legal pluralism, and, in so doing, to harden existing general rights in their application to indigenous communities. Nonetheless, it does not create new rights, which can be exercised outside overarching human rights frameworks.

These principles have been replicated in other countries with large pre-national populations. In a very important case in Guatemala, for example, the Supreme Court has given immediate effect to provisions for indigenous justice under ILO 169, and it has attributed greater authority to indigenous justice than to rulings handed down by ordinary courts. In so doing, however, it has carefully interpreted ILO 169 in conjunction with international human rights instruments, especially the ACHR, and it has ensured that the domestic primacy granted to indigenous law is framed by

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<sup>135</sup> See Constitutional Court of Colombia, Decision T-349/96.

<sup>136</sup> See Constitutional Court of Colombia, Decision T-254/94.

<sup>137</sup> Ibid.

<sup>138</sup> ILO 169 Article 8(2) states that the exercise of rights of autonomy by indigenous groups is restricted by human rights law, *supra* note 18.

<sup>139</sup> See Constitutional Court of Colombia, Decision T-254/94.

international norms.<sup>140</sup> In Bolivia, the Constitutional Court has declared that indigenous authorities can deliver their own justice, but the Court retains the duty to oversee indigenous jurisdictions and to preserve the supremacy of constitutional and fundamental rights.<sup>141</sup> Broadly, the Bolivian courts have endeavoured, theoretically, to promote a pluralistic method of *inter-cultural constitutional review* for addressing potential asymmetries between indigenous norms and national-constitutional or international law. This approach acknowledges the pluralism of the Bolivian domestic legal order as a ‘founding element of the state’, and it both sanctions and actively attempts to preserve the co-existence of multiple systems of justice within the national polity.<sup>142</sup> Simultaneously, however, this approach dictates that national courts in Bolivia must act to guarantee that the exercise of indigenous customs is circumscribed by, and, in cases of conflict, subordinate to, higher-ranking constitutional rights, including internationally defined norms. In the Bolivian setting, courts assume a distinctively pivotal role within the multi-focal legal order of society, and they are ascribed responsibility for the ‘weighing up’ of the rights and claims inscribed in the different legal domains in society.<sup>143</sup> Such acts of weighing up are formally defined as part of the courts’ constitutional obligation to promote general societal conditions of ‘living well’ (*vivir bien*) – that is, to bring harmony to relations between different ethnic groups in Bolivian society.<sup>144</sup> Primarily, however, this method is underpinned by the assumption that international human rights law possesses a basic normative primacy, and it only permits marginal or proportionate divergence of indigenous legal processes from higher-ranking human rights norms.<sup>145</sup>

### 5.1.2.3 Rights to political self-legislation

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<sup>140</sup> Supreme Court of Guatemala, *Caso de Francisco Velásquez López*, Recurso de casación 218-2003 (7.10.2004).

<sup>141</sup> See Plurinational Constitutional Court of Bolivia, Decision 1422/2012.

<sup>142</sup> See Ibid.

<sup>143</sup> See Ibid.

<sup>144</sup> In Bolivian jurisprudence, *vivir bien* [to live with dignity] is defined as an overarching axiomatic principle to hold together the plural legal and cultural orders in society. This concept is officially based in socio-anthropological analysis of the moral values of the Aymara people. See Simón Yampara Huarachi, ‘Cosmovivencia Andina: Vivir y convivir en armonía integral – *Suma Qamaña*’ (2011) 8 Bolivian Studies Journal 18 1 at 13.

<sup>145</sup> Art 410, II of the 2009 Constitution establishes a doctrine of the block of constitutionality for Bolivia. For comment on these points see María Elena Attard Bellido, *Sistematización de jurisprudencia y esquemas jurisprudenciales de pueblos indígenas en el marco del sistema plural de control de constitucionalidad* (La Paz: Fundación Konrad Adenauer, 2014) 41-42.

Rights to political self-government by indigenous communities are also widely subject to judicial restriction under national-constitutional law and international norms, even in states that ostensibly grant far-reaching political autonomy to indigenous peoples.

By way of example, in Colombia, the Constitutional Court has established broad normative parameters to ensure legislative autonomy for indigenous communities. However, it has also declared that any such autonomy is constitutionally limited by fundamental rights defined in international law, including the ACHR.<sup>146</sup> Striking illustrations of this limiting approach can be found in Bolivia. As mentioned, the 2009 Constitution of Bolivia provides for the eventual establishment of fully autonomous indigenous regions (*autonomías*). In this regard, the Constitution states (Art 304 I(1)) that, as a condition of recognition, aspiring *autonomías* must draft a founding statute, which must be scrutinized by the Constitutional Court, and ultimately declared in accordance with constitutional law. This process implicitly subjects indigenous *autonomías* to the normative hierarchy of domestic laws, which includes international human rights law. In fact, the Statute of the first Bolivian *autonomía*, in Charagua, clearly reflects this founding principle, and it specifically defines indigenous self-governance institutions as elements within an overarching constitutional system, which integrates domestic constitutional law and international human rights law. At one level, this Statute notes that the creation of the *autonomía* gives effect to international law, especially to ILO 169. However, it recognizes all obligations arising from Bolivia's international treaties (Arts 13 and Art 29), so that the powers of the *autonomía* in Charagua are unquestionably subordinate to international legal norms. In deciding on the compatibility of the Statute of Charagua with the constitution, then, the Constitutional Court declared that any formal recognition of the *autonomía* as a self-governing region presupposes its adherence to constitutional law and international law. In fact, in this ruling, the Court recognized the importance of ILO 169 and the UN Declaration on Indigenous Rights for indigenous autonomy under Bolivian law. But it also stated, as a matter of form, that 'indigenous autonomy must be subordinate, not only to ratified treaties and conventions that address indigenous peoples, but also to ratified treaties and conventions that address the nation more widely'.<sup>147</sup> By

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<sup>146</sup> See Constitutional Court of Colombia, Decision T-257/93.

<sup>147</sup> Plurinational Constitutional Court of Bolivia, Decision 0013/2013 30.

implication, the Court declared that the autonomous powers of the Charagua community were both constituted and circumscribed by norms of international law, and they were legitimated by a balance between different international-legal provisions.<sup>148</sup>

In these respects, it becomes evident that, even in states granting high levels of autonomy to indigenous groups, the collective judicial and political rights of indigenous communities in Latin America are subject to *strict inner-legal control*. Tellingly, the political powers of indigenous groups are habitually determined through the use of the principle of proportionality. That is to say, the exercise of autonomous powers by such communities is considered permissible to the degree that it does not disproportionately conflict with domestic human rights law and international human rights law.<sup>149</sup> To this extent, the powers of indigenous communities are constructed by principles of public law that, with slightly less latitude, also apply to other public-legal entities.

#### 5.1.2.4 Definition of indigeneity

At a formal level, as can be seen, many Latin American courts have developed a clear construction of indigenous peoples as distinct legal subjects. In Colombia, for example, the Constitutional Court has declared that indigenous communities form a distinct ‘collective subject’, which cannot simply be viewed as the sum of ‘individual subjects that share the same rights or diffuse or collective interests’.<sup>150</sup> In Bolivia, similarly, the courts have defined indigenous populations as ‘collective legal subjects’,<sup>151</sup> endowed with rights that warrant differential protection or particularly robust guarantees.<sup>152</sup>

Beneath the level of formal legality, however, the construction of indigenous groups as legal subjects in Latin American societies does not radically alter the parameters of national constitutional law or international human rights law. Tellingly, the concept of differential recognition has been established in a period of time in which a growing range of subjects has been granted intensified protection in their basic rights. In Colombia, for example, differential protection has been extended to include displaced

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<sup>148</sup> See Tamburini, ‘La jurisdicción indígena’, *supra* at 113, 249, 250-51.

<sup>149</sup> See Constitutional Court of Colombia, Decision T-254/94, which is seminal for the discussion of the use of the principle of proportionality in cases of conflict with human rights law.

<sup>150</sup> See Constitutional Court of Colombia, Decision T-380/93.

<sup>151</sup> See Plurinational Constitutional Court of Bolivia, Decision 1624/2012.

<sup>152</sup> See Plurinational Constitutional Court of Bolivia, Decision 0037/2013-L.

populations, and, within such groups, it has been still further intensified for women and children.<sup>153</sup> Differential protection for such groups has been widely supported through citation of international human rights and humanitarian law.<sup>154</sup>

The legal indistinctiveness of the category of indigeneity in Latin America is most clearly underlined by the fact that the title of indigeneity, and attendant cultural rights, can be claimed by many persons, and indigenous rights are not firmly correlated with objectively identifiable attributes. Importantly, courts in many countries have replicated international guidelines in emphasizing the significance of *self-identification* as the basic determinant of indigeneity. The Colombian Constitutional Court has followed ILO 169 in declaring ‘self-identification’ the main standard for determining indigeneity.<sup>155</sup> In one Bolivian case, it was decided that the self-identification of legal claimants as indigenous is the ‘essential element and the point of departure for such peoples’.<sup>156</sup> In consequence, a variety of different organizations, including peasant groups, and neighbourhood collectives, have been able to lay claim to indigeneity, or at least to the entitlement to collective rights.<sup>157</sup> Moreover, importantly, indigenous population groups in Bolivia often designate themselves in multiple categories, not all of which clearly prioritize ethnic membership. For example, different indigenous communities in Bolivia categorize themselves formally as ‘naciones originarias’ (*original nations*), ‘pueblos indígenas’ (*indigenous peoples*), and ‘naciones originarias campesinas’ (*original peasant nations*), each of which terms implies claims to ethnic unity of varying intensity. Very notably, in fact, the *autonomía* in Charagua, which is, nationally, the first fully self-governing indigenous region created under the Bolivian Constitution of 2009 and, globally, the first such community created under ILO 169, is not characterized by ethnic homogeneity. In addition to members of the majority Guaraní community, Charagua comprises large numbers of Mennonites of German descent, as well as Aymaras and

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<sup>153</sup> See Constitutional Court of Colombia, Decision T-602/03; and Auto-092/08 III.1.9. In the latter declaration, it is stated that the state has intensified obligations towards persons disproportionately affected by civil violence, especially women, and, still more especially, indigenous women. Human rights protection is calibrated to fit the level of vulnerability of the affected persons. For comment see César Rodríguez Garavito & Diana Rodríguez Franco, *Cortes y cambio social – Cómo la Corte Constitucional transformó el desplazamiento forzado en Colombia* (Bogotá: Dejusticia, 2010) 204.

<sup>154</sup> See Constitutional Court of Colombia, Decision T-267/11.

<sup>155</sup> See Constitutional Court of Colombia, Decision T-792/12.

<sup>156</sup> See Constitutional Court of Colombia, Decision 0645/2012.

<sup>157</sup> See Plurinational Constitutional Court of Bolivia, Decision 0026/2013; and Decision 1225/2013.



Quechuas who have migrated from the Bolivian uplands.<sup>158</sup> This community is founded, not in uniform patterns of ethnic subjectivity, but in inter-group agreements ('pactos sociales'), which are partly defined by and reflect international norms.<sup>159</sup> The legal subjectivity of indigeneity, consequently, is not to be confused with indigeneity as a material fact. Instead, it is one part of a broad mass of claims, linking a range of interconnected subjects, which are articulated as global legal norms penetrate into national society.

Overall, indigenous rights in the national case law of Latin American states are not generically distinct from other rights, and they do not rest on clearly distinct foundations. The extent to which these rights are attributed to uniquely defined subjects is limited. In fact, rights claimed as rights pertaining to indigenous peoples are often constructed through processes, for which indigeneity is not a primary determinant. The primary impetus behind the hardening of indigenous rights is that human rights jurisprudence more generally is in a process of global expansion, largely owing to a heightened interaction between national and international law. On this basis, the construction of indigenous rights in the region depends, not on the demands of objective societal subjects, but on articulations between different levels of the global legal system. These articulations naturally create openings in which subjects that wish to be identified as indigenous can effectively mobilize for rights. Yet, the substance of these rights is largely generated through amplification of rights that have already been developed in the global legal system, and which, in principle, are justiciable for many subjects. In most cases, globally defined rights underpin a system of rights within national law, widening these rights so that national legal bodies can attach uniform rights to a growing range of claimants in national society, linking groups with distinct structural and ethnic affiliations to a single normative system. The key sociological outcome of this is that national law acquires a dramatically extended capacity for the integration of different actors in society, it penetrates more deeply into national society, and it obtains heightened inclusivity across society.

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<sup>158</sup> See discussion in Wilfredo Plata, 'Charagua: El autogobierno Guaraní Iyambae' in José Luis Exeni Rodríguez, ed, *La larga marcha* (La Paz: FRL, 2015).

<sup>159</sup> Interview conducted with Gonzalo Vargas, Vice-Minister for Autonomous Indigenous Communities of Bolivia, 6<sup>th</sup> of April of 2016

## 5.2 Municipal Human Rights Law in Africa

### 4.2.1 Constitutional and Statutory Law

As at the regional international level, constitutional and statutory protection for rights of indigenous communities in African states is less substantial than in Latin America. Few African constitutions make strict and express provision for the protection of particular indigenous peoples. One obvious reason for this is that, traditionally, some African constitutions were expected to support a dominant ethnic elite. More recently, in some cases, democratic constitutions have been written against an unsettling backdrop of inter-ethnic conflict. Consequently, the authors of African constitutions have endeavoured to promote an expressly national legal order above the fissures between rival population groups.<sup>160</sup> Nonetheless, indigenous rights are recognized in the Preamble to the constitution of Cameroon and in Articles 6 and 148 of the 2015 Constitution of the Central African Republic. Other constitutions, such as those of Mali, Burundi, and South Africa, provide more general protection for indigenous groups, especially under clauses and declarations acknowledging rights of linguistic, cultural and epistemic diversity.<sup>161</sup> The Ethiopian Constitution is based in a model of tripartite power-sharing ethno-federalism, which gives clear powers of autonomy to ethnic groups with dominant status in given regions.<sup>162</sup> More generally, however, African constitutions only give subsidiary recognition to indigenous rights, and many constitutions actively promote a legal order based in trans-population unity.<sup>163</sup>

Naturally, this is not to say that indigenous rights are not defended in the municipal law of African polities. In fact, many constitutions offer distinctive openings for the claims of indigenous peoples. This is often visible, for example, in laws regarding health-care access, land management, and environmental protection.<sup>164</sup> Also, in many cases, protective provisions for minorities implicitly cover indigenous peoples. For instance,

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<sup>160</sup> See discussion of Kenya in this regard in Alicia Bannon, 'Designing a Constitution-Drafting Process: Lessons from Kenya' (2007) 116:8 Yale L.J. 1824 at 1854; Bruce J. Berman, 'Ethnic Politics and the Making and Unmaking of Constitutions in Africa' (2009) 43:3 Canadian Journal of African Studies 441 at 455.

<sup>161</sup> See *Overview Report*, supra note 19 at 18-19.

<sup>162</sup> Notably for the scope of our argument, the robust determination of rights attached to separate ethnicities in Ethiopia is often seen as impacting detrimentally on the development of national democratic citizenship. See Lovise Aalen, 'Ethnic Federalism and Self-Determination for Nationalities in a Semi-Authoritarian State' (2006) 13:23 Int. Jour. Minority and Group Rights 243 at 256.

<sup>163</sup> See Zips-Mairitsch, *Lost Lands?*, supra note 31 at 110.

<sup>164</sup> See *Overview Report*, supra note 19 at 53.

the Kenyan Constitution (2010) does not specifically protect indigenous peoples, yet it prescribes affirmative action for minorities and marginalized groups (Art 56). In many African societies, further, the collective rights of indigenous communities are quite broadly protected under constitutional and statutory provisions relating to customary law.<sup>165</sup> Significant examples of this are Kenya,<sup>166</sup> and South Africa (1996 Constitution, Articles 211-212). Also exemplary in this respect is the 1992 Constitution of Ghana,<sup>167</sup> where several ethnic groups, for instance the Akans, the Mole-Dagbani, the Ewe, and the Ga-Dangme, co-exist. The 1992 Constitution (Art 273) established the National House of Chiefs, which has appellate jurisdiction in matters affecting chieftaincy. Moreover, rights to ethnic and cultural identity and ethnic legal thought and practice are construed as an inherent part of the Ghanaian legal system. In Article 11(3), the Constitution recognizes and supports patterns of customary law in Ghana as practiced and applied by the various ethnic groups. Important in this regard is the fact that ethnic rights relating to land ownership are constitutionally protected.<sup>168</sup>

### 5.2.2 Jurisprudence of superior courts

Alongside such examples of generic recognition, courts in different African countries have also, in recent years, shown acceptance of indigeneity as a premise for specific legal rights, especially in land cases. In Botswana, courts have declared that there exists a distinct ‘class of peoples’, which is formed by indigenous groups, and which can lay claim to particular rights.<sup>169</sup> The recognition of indigeneity as a foundation for distinct rights has been expressed more emphatically in South Africa, where, in a leading series of cases, the Supreme Court of Appeal and the Constitutional Court acknowledged that indigenous customary law provides a basis for collective rights.<sup>170</sup> In these cases, the Constitutional Court stated unequivocally ‘that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms

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<sup>165</sup> See Ndahinda, *Indigeness in Africa*, supra note 90 at 93-5; and Bonny Ibhawoh, ‘Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State’ (2000) 22:3 Hum. Rights Q 838 at 847.

<sup>166</sup> The Kenyan Constitution of 2010 (Article 63) protects community land held under customary law.

<sup>167</sup> See Catherine Boone, *Property and Political Order in Africa. Land Rights and the Structure of Politics* (Cambridge: Cambridge University Press, 2014) 225.

<sup>168</sup> For instance, on the constitutional creation of an enforceable trust in relation to skin and stool lands see *Onusu v Adjei*, 1991 2 GLR 493 at 516.

<sup>169</sup> See *Sesana and Others v Attorney-General*, 2006 AHRLR 183 (BwHC 2006) 117 [*Sesana*]. See Zips-Mairitsch, *Lost Lands?*, supra note 31 at 346.

<sup>170</sup> See *Richtersveld Community and Others v. Alexkor Ltd and Another*, 2003 SA 6 (SCA) [*Richtersveld Community*].

within the legal system'.<sup>171</sup> Indeed, in these cases, it was ruled that, for pastoralist communities, not even fixed and permanent inhabitation is required as a precondition for the assertion of legal rights: indigeneity can create a quite distinctive legal personality.<sup>172</sup> Kenyan courts have at times been reluctant to establish rights for indigenous groups.<sup>173</sup> In notable cases, however, judges in Kenya have decided that persons forming an 'indigenous and distinct community' possess a collective personality, entailing 'attendant rights and protections'.<sup>174</sup> Kenyan courts have also opted to recognize the principle, promoted by the IACtHR, that 'the distinguishing factor for indigenous communities is their historical ties to a particular territory'.<sup>175</sup> On this basis, the Kenyan courts have adopted a moderately protective approach towards land claims made by indigenous groups.

Although not elevated to the same degree of constitutional protection as in Latin America, therefore, indigeneity is surely emerging in domestic law in African states as a qualification for collective legal personality and collective rights. This applies in particular to rights to land.<sup>176</sup> Moreover, African jurisprudence in these questions has begun to reflect global tendencies, and it displays a strong articulation between national and global law. As discussed below, the jurisprudential analysis of indigeneity in African societies resembles Latin American models in that the rights ascribed to indigenous groups are mainly constructed through an expansive interpretation of other rights. In many cases, rights are generated for indigenous communities because of the distinctive deprivations which they suffer, and the actual quality of indigeneity is relatively marginal to the legal outcome. As in Latin America, indigenous rights in Africa typically result from a wider set of legal constructions, and their correlation with materially distinct legal subjects is uncertain.

#### 5.2.2.1 Rights to land, life and resources

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<sup>171</sup> See *Alexkor Ltd and Another v. Richtersveld Community and Others* 2003 SA 5 (CC) at para 51 (S. Afr.).

<sup>172</sup> See *Ibid* and *Richtersveld Community*, *supra* note 170.

<sup>173</sup> See *Kemai and Others v. Attorney-General and Others*, 2005 118 AHRLR (H.C.K. 2000). One Kenyan judge has deemed a claim of exclusive right to land grounded in ethnic entitlement to be 'fallacious'. See *Simion Swakey Ole Kaapei and 89 Others v. Commissioner of Lands and 7 Others*, 2014 at para. 34.01 (H.C.K.).

<sup>174</sup> See *Rangal Lemeiguran and Others v. Attorney General and Others*, 2006 (H.C.K.) [*Rangal Lemeiguran*].

<sup>175</sup> See *Joseph Letuya and 21 Others v. Attorney General and 5 Others*, 2014 (H.C.K.) [*Joseph Letuya*].

<sup>176</sup> In some cases, indigenous communities are recognized as having rights to 'knowledge, culture, and ideologies'. See *Sesana*, *supra* note 169. In other cases, indigenous communities are seen as possessing rights 'to sustain their ways of life as well as their cultural and ethnic identity'. See *Joseph Letuya*, *supra* note 175.

In the leading cases concerning indigenous rights in Africa, particularly those addressing land rights, such rights are usually extracted, not from distinctive features of the subjects concerned, but from other primary rights, especially the right to life, and from the right to resources (often water) connected to, or acting as a precondition for, the right to life. For example, in the first Botswanan cases establishing indigenous rights, rights to land for the San people were construed as inseparable from rights to vital resources.<sup>177</sup> Tellingly, this case was partly decided through reference to the UN's recognition of a right to water in 2010 (Resolution 64/292), and partly through interpretation of the African Charter. In the Kenyan High Court, indigenous land rights have been established through their conjunction with the right to live in dignity and the right to live in a healthy environment.<sup>178</sup> In other Kenyan cases, the courts have found that the rights to life, dignity and economic and social rights of indigenous communities had been infringed through land allocations and by their enforced removal from historically occupied territories.<sup>179</sup> In these cases, indigenous land rights were established on grounds having little to do with indigeneity. The right to life, rather than any right distinctively inherent in indigeneity, formed the basis for guarantees for land rights.

Notable in such cases, moreover, is the fact that the rights to land ascribed to indigenous communities do not have a strictly unique status. To some degree, these cases reflect a more general amplification of the right to life in African law.<sup>180</sup> In a number of African societies, similar combinations of rights to land and rights to life, partly derived from international sources, have been established to settle cases in which other collective marginalized subjects have claimed damages.<sup>181</sup> In fact, in many societies, non-indigenous subjects have experienced the violations that typically afflict indigenous populations, and their claims have been resolved on similar grounds, providing entitlement to similar rights.

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<sup>177</sup> See *Sesana*, supra note 169; *Mosetlhanyane and Others v Attorney General of Botswana*, 2011 Civil Appeal No. CACLB-074-10. This ruling overturned the far more restrictive ruling of the High Court, in *Mosetlhanyane and Another v the Attorney General*, 2010 3 BLR 372 HC.

<sup>178</sup> See *Charles Lekuyen Nabori and 9 Others v Attorney General and 3 Others*, 2008) at p.78 (H.C.K.).

<sup>179</sup> See *Joseph Letuya*, supra note 175.

<sup>180</sup> See *Minister of Health v. Treatment Action Campaign* 2002 SA 5 (CC).

<sup>181</sup> See *Mazibuko and Others v. City of Johannesburg and Others* 2009 SA 1 (CC).

By way of exemplification, the Kenyan courts have heard a number of legal cases involving the large-scale displacement of non-indigenous or mixed-provenance communities. In these cases, evicted communities have usually been exposed to land deprivations similar to those suffered by indigenous groups. In such cases, courts have widely relied on the same principles used in cases concerning indigenous groups, and they have sought to protect evicted communities by enforcing ‘internationally recognized human rights standards’, including ‘the right to dignity, life and security’.<sup>182</sup> In a leading Kenyan High Court case, it was judged that large-scale eviction forms an unconstitutional action towards those affected by it because it ‘robs them of their dignity, jeopardizes their right to health, and threatens their right to life’.<sup>183</sup> In similar cases in South Africa, the courts have seen fit to cite ‘the right to human dignity and the right to life’ as a means to obstruct evictions.<sup>184</sup>

Overall, indigenous rights in Africa are widely consonant with rights generally accorded to other systematically marginalized subjects. The actual fact of indigeneity is not a fully material legal determinant of these rights.

#### 5.2.2.2 Right to judicial autonomy and political self-legislation

As in Latin America, African legal systems are reluctant to extend protection for indigenous rights to include free-standing rights of political and judicial autonomy. This is visible, first, in the constitutional texts of many African states, which, in provisions for regional or local government, clearly dictate that such powers can only be exercised within the normative order of the constitution. This is evident in Article 2(4) of the Kenyan Constitution, Article 39(2) of the Constitution of South Africa and Articles 26(2) and 39(2) of the Constitution of Ghana. Moreover, in African legal systems that allow latitude in the application of customary law, there is a strong tendency for courts to apply international human rights law as a means to control the autonomy of customary law.<sup>185</sup> Key examples of the limits imposed on customary law can be provided from South Africa, whose Constitution (Art 211(3)) recognizes customary law as part of the

<sup>182</sup> See *Satrose Ayuma and 11 Others v. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 3 Others*, 2010 at para 15 (H.C.K.) (Kenya) [*Satrose Ayuma*].

<sup>183</sup> See *Mitu-Bell Welfare Society v. Attorney General and 2 Others*, 2013 at para 59 (H.C.K.) (Kenya).

<sup>184</sup> See *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v. City of Johannesburg and Others*, 2008 SA 3 (CC).

<sup>185</sup> See *Rono v. Rono and Another*, 2005 (H.C.K.).

domestic constitutional order. This is evidenced by one of the most famous cases in recent African history, the South African death-penalty case, *S v Makwanyane and Another* (1995).<sup>186</sup>

In this case, first, the Constitutional Court acknowledged that South African society contains multiple legal orders, in the context of which 'indigenous value systems' should act as a key premise for the development of domestic public law.<sup>187</sup> Second, the Court stated that the recognition of indigenous law as part of the plurality of legal values in South African society meant that such law must always be subject to certain strict and necessary normative limits, and indigenous law should not be accorded authority that exceeds the fundamental rights provisions in the constitution.<sup>188</sup> On this basis, further, the Court decided that, in order continuously to develop customary law, the Constitution 'requires courts to proceed to public international law and foreign case law for guidance in constitutional interpretation', implying that international law can help to promote 'the cultivation of a human rights jurisprudence for South Africa'.<sup>189</sup> As a result, the Court affirmed indigenous law and international law at the same time, arguing that legal reasoning fusing the two legal domains should form the primary foundation for South African law. Although not employing international human rights law to suppress indigenous law, the Court clearly set out a construction of international human rights law as an overarching order, within which indigenous law had to be interpreted, elaborated, and refined.

In Africa, provisions for the political autonomy of indigenous communities are also constrained by higher legal norms. To be sure, we can find judicial rulings that uphold political rights for indigenous communities. However, such rulings usually promote adequate integration of indigenous communities within national systems of representation. An important example is the Kenyan High Court case, *Rangal Lemeiguran & Others v Attorney General & Others* (2006), regarding the claim of the Il Chamus people that their fundamental political rights had been denied by the fact that they were not recognized as a special interest group, entitled to distinct political

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<sup>186</sup> See *S v. Makwanyane and Another*, 1995 SA 3 (CC) (S. Afr.).

<sup>187</sup> See *Ibid* at para 304.

<sup>188</sup> See *Ibid* at para 366.

<sup>189</sup> See *Ibid* at para 304.

representation during elections. In this instance, the Court found that sufficient evidence had been provided that the community formed ‘a unique cohesive homogenous and a cultural distinct minority’, proudly displaying ‘all the attributes of the internationally recognized indigenous peoples’.<sup>190</sup> Then, despite the fact that this instrument had not been incorporated, the Court relied directly on ILO 169 in deciding that ‘[r]epresentation is a clear constitutional recognition of a positive right of the minority – to participate in the State’s political process and influence State policies’.<sup>191</sup> On these grounds, the Court determined that the Il Chamus should have the right to be represented as a collective subject in the national political system. At no point, however, was it implied in this case that the distinct status of the Il Chamus could provide entitlement for special rights outside the national political order. On the contrary, the ruling was intended to extend generally sanctioned political rights to the Il Chamus. In this case, the Court constructed a definition of ‘indigenous’ that was, in essence, synonymous with ‘minority community’.<sup>192</sup>

In these key instances, the extent to which indigenous communities in Africa can claim distinct judicial or political rights remains limited. Overall, indigenous rights in Africa resemble those in Latin America in that they are not primarily attached to sui-generis models of legal subjectivity, and they are not substantially different from other rights. They result mainly from interactions between national and international levels of the legal system, and in most concrete cases, they are produced through adaptive interpretation of already existing rights.

## **6. Agency of indigeneity**

Perhaps the most distinctive feature in the legal construction of indigeneity is not the concrete rights that are attached to it, but rather the legal practices and *patterns of legal mobilization* that often accompany it. One of the most salient points in the rise of indigenous rights, in fact, is that such law is configured by new patterns of collective advocacy, and it reflects the recognition, visible in many societies, that non-classical legal representatives can pursue legal claims, and that such actors can play a role in the

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<sup>190</sup> See *Rangal Lemeiguran*, supra note 174 at 25.

<sup>191</sup> See *Ibid* at 29.

<sup>192</sup> See *Ibid* at 8.



expansion of rights, and even in the creation of new constitutional laws. The importance of litigation as a form of political participation is strongly reflected in some theories of pluralism.<sup>193</sup>

To illustrate this, first, the fact that persons claiming indigenous rights are usually located in marginal social positions often means that subjects filing suit to assert such rights stand outside conventional legal categorizations, and cases are initiated by a broad array of legal actors. This is particularly the case because such proceedings often involve representation of interests of groups who do not have extensive legal knowledge, and lack access to standard legal resources. In consequence of this, many cases regarding indigenous interests have been instigated by proxies, in particular by human rights organizations or designated organs of the state. Striking examples of this are found in leading African cases, in which, in some instances, the authority of the given proxy to take the case has been challenged, and courts have strategically adopted wide rules on locus standi to permit litigation for indigenous communities.<sup>194</sup> Most significantly, however, the Colombian Constitutional Court has repeatedly applied Article 2304 of the Colombian Civil Code to allow the representation of indigenous groups by proxies, even without formal knowledge of the affected communities themselves (that is – by *agencia oficiosa*). In such cases, the Court has ruled that ‘lack of legal knowledge, economic incapacity, and linguistic limitations’, all of which may constitute an impediment to effective filing of suit by indigenous persons, can provide justification for an unknown proxy to take a case to court.<sup>195</sup> In Peru, NGOs have also been given standing to represent indigenous groups without their knowledge.<sup>196</sup>

Equally importantly, many cases regarding indigenous rights are brought to court through public interest litigation. This is evident in African cases, many of which, in broad terms, can be categorized as examples of public interest litigation.<sup>197</sup> In some

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<sup>193</sup> See Wolkmer, *Pluralismo jurídico*, supra note 15 at 291-94.

<sup>194</sup> See *Rangal Lemeiguran*, supra note 174 at 29.

<sup>195</sup> See Constitutional Court of Colombia, Decision T-342/94.

<sup>196</sup> See Asociación Interétnica de Desarrollo, supra at 121.

<sup>197</sup> We use a flexible definition of the concept of public interest litigation, which is able to describe similar phenomena across different legal systems. Our definition refers to examples of litigation in which interests of minority or vulnerable groups are filed by advocates in order strategically to reinforce identified public interests. For this sense of the concept see Scott L. Cummings, ‘The Internationalization of Public Interest Law’ (2008) 57:4 Duke L.J. 891 at 985.

Latin American countries, provisions for public interest litigation are strictly formalized in domestic law, and litigation of this kind is clearly identified as a strategy for representing and reinforcing rights of indigenous population groups. In Colombia, collective *tutelas* (direct human rights petitions) have been identified as an effective procedure for representation of indigenous communities. The Constitutional Court has formally stated that *tutelas* offer the most robust ‘judicial defense mechanism’ for protecting rights of indigenous population groups.<sup>198</sup> However, more conventional patterns of public interest litigation, filed through the administrative courts and referred ultimately to the *Consejo de Estado* (Council of State, the Supreme Administrative Court in Colombia), have been used in attempts to defend the more diffuse rights and interests of indigenous groups, such as the right to an intact environment.<sup>199</sup> In fact, the Colombian Constitutional Court has declared that the public interest suit is a singularly appropriate means to consolidate the general rights of indigenous communities.<sup>200</sup> In Bolivia, public interest litigation has acquired particular importance for the protection of indigenous populations. In one ruling, the Constitutional Court stated that public interest litigation is an especially adequate method for asserting the rights of indigenous and peasant peoples.<sup>201</sup> The main reason for this, the Court declared, is that public interest proceedings are often marked by procedural flexibility, which means that such litigation provides a channel of access to the court for groups for whom the legal system was traditionally alienating or forbidding. However, a further reason for this is that many cases concerning indigenous rights refer to diffuse interests, such as the right to culture or to a healthy environment, which are only weakly protected under the constitution, and which are more effectively litigated on a public interest basis than on grounds of particular subjective damages. In Bolivia, consequently, public interest cases have assumed singular importance in articulating the rights of indigenous groups, ranging from particular rights to self-administration and to residence in ancestral territory,<sup>202</sup> to more diffuse rights to cultural development, to spirituality, and to control of natural resources.<sup>203</sup> Significantly, many relevant public interest cases in Bolivia have expressly entailed a

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<sup>198</sup> Constitutional Court of Colombia, Decision T-601/01; and Decision T-153/10.

<sup>199</sup> Council of State of Colombia, *Ángela María Maldonado Rodríguez y otros*, 2013, AP 250002324000201100227 01.

<sup>200</sup> Constitutional Court of Colombia, Decision T-380/93.

<sup>201</sup> Plurinational Constitutional Court of Bolivia, Decision 0572/2014.

<sup>202</sup> Plurinational Constitutional Court of Bolivia, Decision 1422/2012.

<sup>203</sup> Plurinational Constitutional Court of Bolivia, Decision 0572/2014.

linkage between domestic claims and international legal provisions, such that courts have used international law to define indigenous rights.<sup>204</sup>

In most jurisdictions that have given elevated recognition to indigenous rights, consequently, this process has been partly driven by atypical, collective patterns of litigation, by non-classical forms of legal representation, and by non-traditional legal procedures. In this respect again, however, it is important to observe the rise of indigenous rights as one part of a broader aggregate of legal-systemic processes. On one hand, the correlation between indigenous rights and public interest cases has occurred in a wider social constellation in which rules on locus standi have generally been subject to relaxation, and litigation over diffuse or collective rights has been actively encouraged.<sup>205</sup> On the other hand, the methods used for domestic representation of indigenous groups do not usually differ substantially from strategies deployed to protect the interests of other marginalized communities. Cases involving groups or subjects, such as evictees or displaced persons, who are exposed to violations commonly experienced by indigenous groups, have also quite typically involved the use of proxies and public interest litigators.<sup>206</sup> As a result, indigenous rights cases often exemplify a growing trend towards the de-formalization of litigation procedures and the promotion of public interest litigation, in which widened rules on standing generally facilitate the defence of vulnerable minorities and the construction of collective rights. In each respect, the formation of new patterns of legal agency amongst advocacy groups mirrors a wider legal process, and it does not indicate recognition of indigenous groups or their advocates as sui-generis legal subjects. In each instance, the emergence of new modes of legal agency reflects the societal extension of the legal system, creating categories for the effective integration of historically marginalized societal actors in the legal order.

## 7. Conclusion: Rephrasing indigeneity

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<sup>204</sup> Plurinational Constitutional Court of Bolivia, Decision 1422/2012.

<sup>205</sup> In Colombia, legislation of 1998 (Law 472/1998) defines the categories of person, including single persons and NGOs, that are authorized to initiate public interest cases. In Bolivia, Article 68 of the Constitutional Procedure Code of 2012 makes similar provisions. In Kenya, the Environmental Management and Co-ordination Act (1999) permits public interest litigation in environmental cases.

<sup>206</sup> See the Kenyan case *Satrose Ayuma*, supra note 182; and the Colombian case T-267/11. In the latter case, *agencia oficiosa* was deemed highly appropriate for representing non-indigenous displaced populations.

The idea that indigenous communities possess a distinctive legal personality, to which distinctive rights are attached, is becoming widespread, in practice and in theory. This is clearly established in rulings of the IACtHR, where it has been argued that indigenous communities possess a unique collective legal personality, in which the ‘collective rights of the community’ are separate from the single, individuated rights of its members. On this basis, members of indigenous communities are seen as possessing two distinct legal personalities, one as a collective and one as an aggregate of individual persons, both of which ‘are subject to protection and require specific measures of protection’.<sup>207</sup> At a domestic level, this recognition is perhaps most advanced in Colombian jurisprudence.<sup>208</sup> However, this phenomenon is now increasingly reflected across Latin America and Africa.

As discussed, the recognition of the personality of indigenous peoples is usually accompanied by a construction of society that identifies a plurality of legal regimes existing alongside each other, so that the legal subjectivity of indigenous communities is defined through reference to materially existent communities in society. Accordingly, mobilization of indigenous groups is habitually identified as the expression of plural, sectoral citizenship, designed to ensure that a given set of social practices is covered by rights, usually opposed to formal legal order. However, this pluralistic characterization of indigenous communities as free-standing legal subjects tends slightly to blur the actual legal reality of indigenous communities. Moreover, it obscures the fact that the assumption of legal subjectivity by indigenous groups is part of a wider process of legal subject construction, in which many collective legal subjects are able to claim new rights.<sup>209</sup> Overall, the pluralistic construction of indigenous rights appears both sociologically and jurisprudentially under-reflected. To overcome this, it is necessary to place the distinctive qualities which are imputed to indigeneity as a source of legal personality in a broad global legal context. On the account set out above, indigenous communities do not possess a hard reality outside the rights to which they lay claim. In fact, legal claims usually strip indigenous legal communities out from their factual collective form, such that indigenous rights are constructed, not by society’s external

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<sup>207</sup> See *Plan de Sánchez*, supra note 65.

<sup>208</sup> Constitutional Court of Colombia, Decision T-769/09.

<sup>209</sup> These include, as discussed, displaced persons, evictees, and marginalized social groups. See also Saul, *Indigenous Peoples and Human Rights*, supra note 31, placing indigenous rights on a continuum with other minority rights.

legal pluralism, but by the internal expansion and the growing inclusivity of the law. As a result, the establishment of indigenous rights leads, not to the fragmentation, but to the intensification of the legal system of national society. The form of citizenship that emerges in cases concerning indigenous rights is not sectoral citizenship;<sup>210</sup> it is world citizenship, emerging through the differentiation and increasing interlinkage of the global legal system. Moreover, this form of citizenship does not challenge the formal legal order of society; it reflects its growing inclusivity. The indigenous person assumes rights as global law enters national law; in entering national law, global law creates new, expansive categories for incorporating different societal actors, and it greatly increases the societal penetration of national law. As a result, indigenous rights specifically rely on a dynamic of transnational norm and subject formation which is not essentially linked to primary social identities and affiliations.

The global preconditions of indigenous rights are most evident in the following ways:

First, the general standing of international human rights law in the global legal system means that social demands can be easily addressed, within the law, through constructive interpretation of existing rights, and existing rights can easily be widened to assimilate new legal demands and new patterns of legal claim. The prominence of human rights at the global level of the legal system facilitates legal inclusion of pluralistic groups in national society, positioned in marginal positions relative to the centre of complex social landscapes. Naturally, this facilitates recognition of, and allocation of rights to, indigenous peoples.

Second, the fact that the global legal system is increasingly centred on human rights means that the legal system assumes a form, in which the highest systemic principles of normative authority are declared at an international level, and subsequently internalized within domestic law. As a result, it is increasingly easy for actors in national legal systems (i.e. advocates, and judges) to establish authoritative, binding and relatively uncontested norms to ascribe rights and to adjudicate questions of legal entitlement. Because of this, actors in national legal systems are more easily able to give

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<sup>210</sup> This is the claim in Bello, *Etnicidad y ciudadanía*, supra note 13 at 15.

partial recognition to pluralistic, non-typical, legal subjects, such as indigenous groups. On one hand, international law allows national legal actors to attribute rights to indigenous subjects in uncontroversial fashion, by borrowing from already established normative principles. Yet, on the other hand, international law makes it possible for these actors proportionately to limit such rights, also on relatively uncontested normative premises, wherever they threaten the consistency of the legal order as a whole. The rise of global human rights law thus means that the legal system as a whole has evolved to a heightened degree of flexibility and positive inclusivity; it can generate rights for different groups in complex societies with growing facility and authority, in relatively depoliticized fashion; and it is less likely to be unsettled by particular or pluralistic claims to rights. The increasing inclusivity of the legal system has triggered a wide expansion of sustainable rights claims and a wide proliferation of non-typical collective legal subjects, of which indigenous groups form one important sub-category.

Third, the fact that the legal system is centred, globally, on human rights means that the legitimacy of national legal orders is supported by relatively abstracted general norms, and national law does not fully presuppose the existence of a homogenous national people for its legitimacy. As a result, the primary source of legal authority is moved from the national to the international domain, and the national basis of jurisprudence becomes less dominant. This means that actors with norm-setting responsibility in national legal systems can accept the existence of many different subjects and many different sets of rights within society, as the underlying authority of the legal order is not affected by the fact that it recognizes multiple rights claimants. In fact, as national legal systems support their authority through sources that are no longer specifically national, they are able to incorporate their national constituencies, as holders of divergent sets of rights, in more complex objective form, and in more pluralistic procedural fashion. The construction of indigenous rights reflects this process. In this respect, too, the growth of human rights law as a primary determinant of legal validity has led to an increase in collectivized legal subjectivity, which is partially exemplified by indigenous communities.

Viewed at a macro-sociological level, the emergence of indigeneity as a legal construction, defined by new claims to rights, new claims to legal subjectivity, and new

patterns of litigation, can be seen as a reflection of the increasing inclusivity, and even the growing autonomy, of the global legal system as a whole. Rising recognition of a plurality of legal subjects and a plurality of legal rights can be viewed as an external reflection of the growing penetration of the transnational legal system, which is expressed through the fact that, both within and across national boundaries, human rights form a dominant source of legal communication and validity, fluidly producing new rights in response to new social demands. From a sociological perspective, not *legal pluralism*, but increasing *legal inclusivity*, underpins the rise of indigenous rights. From a sociological viewpoint, moreover, indigenous rights specifically consolidate and extend the inclusive force of national law. Such rights incorporate transnational legal norms in national legal systems, which greatly reinforce the basic cohesion and integrative power of these systems, allowing legal actors to capture indigenous claims in relatively uniform processes of norm construction. Quite generally, the growing plurality of rights within national societies reflects, not the fragmentation, but the deepening extension of the global legal system.